Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WOODSON CONSTRUCTION COMPANY,
Petitioner,

v.

AMOCO PIPELINE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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303 pp

QUESTION PRESENTED

Whether Petitioner was deprived of its right to procedural due process where (a) this case was tried on stipulated facts, (b) the Court of Appeals reversed and remanded for entry of judgment against Petitioner based upon its determination of a factual point that Petitioner had neither stipulated to nor had been afforded an opportunity to present evidence upon, and (c) there were no extraordinary circumstances justifying such a factual determination for the first time on appeal.

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LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons and companies have an interest in the outcome of this case.

Parties:

Woodson Construction Company,
Petitioner
Third Party Defendant-Appellant

Amoco Pipeline Company,
Respondent
Defendant-Third Party Plaintiff-Appellee

Counsel:

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Respondent:

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Insurers: Liberty Mutual Insurance Company
(Petitioner's primary insurer)

Certain Underwriters and Insurance Companies at Lloyd's London subscribing to Policy No. NPE 27908
(Petitioner's excess insurers)

Vesta Insurance Company
(Respondent's insurer)

To Petitioner's knowledge, neither party in this case has parent or subsidiary companies.

TABLE OF AUTHORITIES

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

WOODSON CONSTRUCTION COMPANY respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, A) is unreported. The opinion of the District Court (App., *infra*,F) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on February 22, 1994 (App., *infra*, A), and denied a timely petition for rehearing on April 13, 1994 (App., *infra*,B). On April 25, 1994, the Court of Appeals issued a mandate

reversing and remanding this case to the District Court. On NE, 1994, the District Court entered a final judgment (App., *infra,* M).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the District Court

Woodson Construction Company ("Petitioner") was under contract to Amoco Pipeline Company ("Respondent") to install a new pipeline on Respondent's right-of-way near Kemah, Galveston County, Texas. On or about September 9, 1987, three of Petitioner's employees were injured in a pipeline explosion. The three men brought separate suits against Respondent alleging its negligence. Petitioner was a subscriber to the Texas Worker's Compensation Act, and each plaintiff received worker's compensation benefits from Petitioner's worker's compensation carrier. Respondent subsequently settled the suits and stipulated that its total costs in obtaining the plaintiffs' releases were $6,025,000.00, including attorneys' fees (App., *infra*, E).

Petitioner intervened in the suit filed by one of the plaintiffs, Robert Lee Hamilton, to recover for equipment damaged in the pipeline fire. Respondent then filed a cross-claim against Petitioner, alleging that Respondent was entitled to contractual indemnity or contribution from Petitioner for that portion of Petitioner's negligence that was a proximate cause of the underlying injuries. Respondent's claims are based on the following provision in a construction contract (the "contract") between Petitioner and Respondent:

> The Contractor [Petitioner] shall indemnify and save Company [Respondent] harmless from and against any and all losses, claims,

> demands, liabilities, suits or actions (including all reasonable expenses and attorney's fees) for injuries to or the death of any person or persons, including the employees of each party hereto and the employees of their subcontractors, or for loss of or damage to the property of any person or persons, including the property of Company, caused by or resulting from the negligence of the Contractor or any of its subcontractors or the employees of either, or from poor, improper or unworkmanlike performance of any of the work to be performed hereunder, or by materials (except such as Company may have furnished) used in said work which are defective, or by reason of any other thing in connection with the performance of this Contract and the Contractor agrees to reimburse Company for all sums which Company may pay or be compelled to pay in settlement of any claim on account thereof, including any claim under the provisions of any worker's compensation law or other similar law, or under any plan for employees' benefits which Company may have or adopt, except that the Contractor assumes no liability for the sole negligence acts of Company, its agents, servants or employees.

Petitioner moved for summary judgment, contending that Respondent was not entitled to either contractual indemnity or contribution (App., *infra*, N). Petitioner argued that the contract did not provide for contribution, that any claim for common law contribution was barred by Petitioner's subscription to the Texas Worker's Compensation Act, and that Respondent's indemnity claim

was invalid because the contractual language did not meet the "express negligence test" as prescribed by the Texas Supreme Court in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (Tex. 1987). In *Ethyl*, the Texas Supreme Court held that a party seeking to be indemnified against its own negligence must expressly state that intention within the four corners of the contract. The *Ethyl* court also held that a party seeking comparative contribution in cases where it is itself negligent must also specifically express that intention within the four corners of the contract. *Ethyl*, 725 S.W.2d at 708-09.

In response to Petitioner's motion for summary judgment, Respondent argued that the express negligence test did not apply because Respondent was seeking indemnity, not for its own negligence, but for Petitioner's negligence (App., *infra*, O). The District Court denied Petitioner's motion for summary judgment (App., *infra*, C). Pursuant to a request by both parties, the District Court specified the sole fact issue precluding summary judgment for Petitioner: what percentage of the plaintiff's injuries was caused by Petitioner's negligence (App., *infra*, E).

Petitioner and Respondent then entered into stipulations of fact (App., *infra*, E), wherein they agreed that each was 50% negligent for the underlying injuries. After the stipulations were filed with the District Court, each side moved for judgment (App., *infra*, Q and R). In its Motion for Judgment, Petitioner contended that it should prevail because (1) the intent of indemnification is to reimburse the indemnitee [Respondent] for its own negligence and not for the indemnitor's [Petitioner's] negligence; (2) the contract did not expressly provide for contribution or indemnification for Petitioner's comparative negligence so as to satisfy the express negligence rule; and (3) Respondent had no contractual, common law, or statutory right to contribution. Respondent moved for judgment based solely on the

stipulations of fact filed with the court, without citing any legal authority.

After considering both motions, the District Court entered a take-nothing judgment in Petitioner's favor, concluding that Respondent could not recover under either an indemnity or contribution theory (App., *infra*, F). Respondent then filed a motion for new trial or to alter or amend the judgment (App., *infra*, S), maintaining that the court's holding was "diametrically opposed" to the court's prior ruling that there was a material fact issue as to the amount of Petitioner's negligence. Petitioner responded that the court's prior ruling was consistent with the argument that Respondent could recover only if Petitioner were 100% at fault (App., *infra*, T,U).

Subsequently, Respondent filed a brief contending that the contractual language in issue contains both an indemnity provision and a "reimbursement" provision that is not subject to the *Ethyl* test (App., *infra*, X). The District Court denied Respondent's motion and stated that Respondent had apparently confused the terms reimbursement and contribution and that "the reimbursement provision in the contract between Respondent and Petitioner does not provide an independent basis for recovery." (App., *infra*, I).

Respondent next filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(1) and (3), seeking to withdraw its stipulation of 50% negligence (App., *infra*, Y), which the District Court denied (App., *infra*, K). The District Court entered a final judgment in Petitioner's favor (App., *infra*, L). The appeal in question followed.

B. Course of Proceedings and Disposition in the Court of Appeals

On appeal, Respondent argued that a Texas Supreme Court decision issued after the District Court's judgment had created an exception to the express negligence rule. This argument was based on a footnote in the case of *Page Petroleum, Inc. v. Dresser Industries Inc.*, 853 S.W.2d 505 (Tex. 1993) ("*Page*"). The *Page* footnote reads as follows:

> The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement. *See generally, Cate v. Dover Corp.*, 790 S.W.2d 559, 561 (Tex. 1990).

853 S.W.2d at 508 n. 2.

Respondent contended that this language introduced an "actual notice or knowledge" exception to the express negligence rule. Under this "exception" as interpreted by Respondent, the parties' intent to provide indemnification to a negligent indemnitee need not be specifically expressed in the contract if it is shown that the indemnitor has "actual notice or knowledge" of the otherwise void indemnity provision. Respondent acknowledged that its interpretation of the *Page* court's opinion would constitute a departure from prior law which required that "the intent of the parties must be specifically stated within the four corners of the contract." *Ethyl*, 725 S.W.2d at 708 (App., *infra*, AC) .

In its appellate brief (App., *infra*, AD), Petitioner responded that Petitioner's actual notice and knowledge of the indemnity agreement was irrelevant because Respondent's claim for reimbursement for the percentage of negligence attributable to Petitioner is actually a request for contribution, not indemnity. Petitioner pointed out to the

Court of Appeals that under Texas law, indemnification is the shifting of the burden of paying the plaintiff for the indemnitee's negligence from the indemnitee to the indemnitor. Because Respondent sought reimbursement for Petitioner's negligence, rather than its own negligence, the claim is one for contribution, a claim that Respondent had waived in District Court. Furthermore, even if the contract were construed as providing indemnification for the concurrent negligence of both parties, the indemnity provision must satisfy the express negligence rule. It is undisputed, however, that the contract did not comply with the express negligence rule.

On February 22, 1994, a panel of the Fifth Circuit held the contract between Petitioner and Respondent to be enforceable, and reversed and remanded the cause to the District Court for entry of an appropriate judgment. The panel determined that "[a]ssuming, without deciding, that under *Ethyl*...Amoco [Respondent] must meet the express negligence test even though it seeks recovery only for Woodson's negligence...," the Texas Supreme Court in *Page* "concluded that the requirements of conspicuity and express negligence are 'not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement.'" (App., *infra*, A). Based on certain excerpts from the deposition testimony of Louis Woodson regarding his belief that Woodson Construction Company would be liable for its own negligence, the Fifth Circuit found that Petitioner had actual notice or knowledge of the indemnity agreement, and that it was enforceable according to Mr. Woodson's understanding. (App., *infra*, A).

Petitioner filed a timely Petition for Rehearing, (App., *infra*, AF) stressing that the issue of Petitioner's actual notice or knowledge of the indemnity agreement was not stipulated to, raised in, or tried by the District Court, and that Petitioner was deprived to its right to develop evidence

bearing on its alleged knowledge of the indemnity agreement. Moreover, Petitioner showed conclusively that the *Page* case did not create an "actual notice and knowledge" exception to the express negligence rule, which would allow for parol evidence to demonstrate the parties' intent to indemnify. Petitioner noted that the *Page* footnote was dicta, that the case addressed materially different issues and facts, and that *Ethyl*, which required express written evidence of the parties' intent, was the controlling case on the facts before the court.

Petitioner also filed a motion to certify the following question to the Texas Supreme Court: "Whether an indemnitor's actual knowledge of a contract clause that does not expressly provide for indemnification of a negligent or concurrently negligent indemnitee creates a duty on the indemnitor's part to indemnify the indemnitee in proportion to the indemnitor's negligence?" The Fifth Circuit refused to certify the question to the Texas Supreme Court, and on April 13, 1994, denied Petitioner's motion for rehearing (App., *infra*, B). The Court of Appeals issued its mandate to the District Court, which entered a final judgment on June 2, 1994 (App., *infra*, M).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit deprived Petitioner of its right to procedural due process rights and abused its discretion by reversing and remanding this cause for entry of judgment after considering and deciding a purely factual question that was not stipulated to, raised, argued, or otherwise developed in the District Court's record, and which was based on a patently erroneous interpretation of an intervening decision by the Texas Supreme Court. The Fifth Circuit's holding was not the result of a change in the law, and it defeated, rather than promoted, the ends of justice.

I.
THE COURT OF APPEALS DEPRIVED PETITIONER OF ITS PROCEDURAL DUE PROCESS RIGHT TO A TRIAL BY JURY

Where a court of appeals has reversed a district court on the basis of a differing interpretation of the applicable state law, which interpretation raises a factual issue not addressed in the district court, the appellant has an absolute due process right to a jury trial on the issue. *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 528-533 (1958). The landmark *Byrd* case is directly on point here. In that case, the Respondent, Blue Ridge, had been sued by Byrd for personal injuries he sustained while working for a Blue Ridge contractor. As an affirmative defense, Blue Ridge asserted a South Carolina statute which afforded parties immunity from suit from employees of their contractors in certain circumstances. The District Court held the statute inapplicable and struck the affirmative defense, resulting in a judgment against Blue Ridge. The Appeals Court disagreed with the District Court's interpretation of the statute, reversed the District Court's judgment, and rendered judgment in favor of Blue Ridge. Byrd appealed to the Supreme Court, arguing that he had been deprived of an opportunity to present evidence pertinent to Blue Ridge's affirmative defense. The Supreme Court agreed, reversing and remanding the case for further fact finding, and reasoning as follows:

> We ordinarily accept the interpretation of local law by the Court of Appeals, [citations omitted] ... and do so readily here since neither party now disputes the interpretation.[1]

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1. In contrast, Petitioner and Respondent in this case vigorously disagree about the correctness of the Court of Appeals' interpretation of Texas law.

> However, instead of ordering a new trial at which the petitioner might offer his own proof pertinent to a determination according to the correct interpretation, the Court of Appeals made its own determination on the record and directed a judgment for the respondent.

Byrd, 356 U.S. at 529-530.

The Supreme Court went on to point out that, as in this case, under the District Court's interpretation of state law, the Petitioner had no reason to offer evidence on an issue that only became an issue because of the Court of Appeals' differing interpretation of state law. *Byrd,* 356 U.S. at 530-532. Like the petitioner in *Byrd*, Petitioner here has been deprived of the right to a jury trial on an issue created by the Court of Appeals' differing interpreation of an affirmative defense under applicable state law.

The holding in *Byrd* is consistent with the due process requirement "that there is a *fair* decision-making process before official action is taken which directly impairs a person's life liberty or property." *Complaint of Bankers Trust Co.*, 752 F.2d 874 (3rd Cir. 1984) (Emphasis in original). Accordingly, judicial practice and procedural rules are designed "to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557-58 (1941). Procedural fairness demands that parties have the opportunity to offer evidence of relevant issues before a fact-finding tribunal, and that parties not be confronted and surprised on appeal by issues upon which they have had no opportunity to present evidence at trial. *Hormel*, 312 U.S. 721.

In furtherance of the fundamental fairness requirement recognized in *Byrd*, a reviewing court generally will refuse to determine issues that were not addressed by the court below and that were raised for the first time on appeal. *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985). The

only exceptions to this general rule exist in the "exceptional" case where: (1) appellate review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) a new issue emerges on appeal because of a change in the law; or (3) the issue is purely a legal one, and either does not depend on facts developed in the court below or the record below has been fully developed. *Bolker*, 760 F.2d at 1042. As will be discussed more fully below, none of these exceptions are applicable to the instant case. Thus, the Court of Appeals' decision erroneously deprived Petitioner of its procedural due process right to be heard and present evidence on a contested fact issue--Petitioner's alleged notice and knowledge of the indemnity provision. This error was an abuse of discretion that affected the fundamental fairness of this proceeding.

A. THE ISSUE OF PETITIONER'S ALLEGED NOTICE OR KNOWLEDGE OF INDEMNITY PROVISION WAS NOT DEVELOPED IN THE RECORD BELOW

The Court of Appeals reversed the District Court's take-nothing judgment in favor of Petitioner and remanded the case for entry of judgment in favor of Respondent on the grounds that Petitioner's alleged knowledge of the indemnity provision overcame the provision's failure to meet the express negligence test. The District Court's judgment was based on stipulated facts (App., *infra*, F). Petitioner's alleged knowledge and the purported effect thereof were not a part of the stipulated facts, and were never properly raised by Respondent or tried in the District Court. A party may not agree to a trial on stipulated facts, and then later attempt to raise new issues after an adverse judgment. *Interfirst Bank Abilene, N.A. v. FDIC*, 777 F.2d 1092, 1096 (5th Cir. 1985); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015,1030 (5th

Cir. 1982); *Tomlinson v. Lefkowitz*, 334 F.2d 262, 262 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

The only evidence in the record regarding Petitioner's alleged knowledge of the indemnity provision is in the form of excerpts from the transcript of Louis Woodson's deposition. Those excerpts occur in two places: first, in Respondent's Response to Petitioner's Motion for Summary Judgment (App., *infra*, O); and second, in Respondent's Brief in Support of its [second] Motion to Enter Judgment, which was filed on December 7, 1992 (App., *infra*, X), well after the Court had entered a final judgment on October 14, 1992 (App., *infra*, F), ordering that Respondent take nothing from Petitioner.

The issues of Petitioner's knowledge of the indemnity provision and the effect of any such knowledge were not before the District Court when it granted its Final Judgment in favor of Petitioner. While Respondent had attached the transcript excerpts to its Response to Petitioner's Motion for Summary Judgment, Respondent's only arguments with regard to Petitioner's alleged knowledge of the indemnity agreement were that (1) Petitioner had waived its statutory (workers' compensation act) immunity from suit; and (2) that the contract should be reformed on grounds of mutual mistake (App., *infra*, O). Furthermore, the District Court ruled that the **only fact issue** precluding summary judgment for Petitioner related to **the existence and extent of Petitioner's negligence, if any** (App., *infra*, D), necessarily implying the District Court's finding that the issue of Petitioner's knowledge of the void indemnity provision was irrelevant. Finally, even if it could be argued that Respondent initially raised the issue of Petitioner's knowledge in its Response to Petitioner's Motion for Summary Judgment, its failure to obtain a stipulation on the issue, and its failure to brief the issue in its original "Motion for Entry of Judgment" (App., *infra*, Q) constituted an

abandonment of that issue, such that it was not grounds for appeal. *Fehlhaber*, 681 F.2d at 1029-30.

Respondent also cited to Louis Woodson's testimony in its Brief in Support of its Motion to Enter Judgment (App., *infra*, X). There, however, Respondent merely argued that Louis Woodson's intent was relevant to interpretation of the reimbursement language in the contract. Respondent did not argue that actual knowledge of an otherwise void indemnity agreement constituted an exception to *Ethyl*'s requirements until its appeal of the District Court's judgment.[2]

Furthermore, the evidence presented in support of Respondent's position was legally and factually insufficient to sustain a judgment against Petitioner in any event. Mr. Woodson's quoted deposition testimony did not establish that he had any authority to bind Petitioner to any agreement or understanding respecting indemnity. Finally, at best, Mr. Woodson's testimony merely demonstrates that he personally had knowledge of a provision which, under *Ethyl*, is void as against public policy.

Because of Respondent's failure to present properly the issue of Petitioner's alleged knowledge, either in the context of the trial on stipulated facts or in its Motion for New Trial, Petitioner was deprived of its right to develop evidence bearing on its alleged knowledge of the nature of the indemnity obligation. In the interests of justice, it is imperative that this Court grant Petitioner's request for a writ of certiorari and order the Court of Appeals to remand the case to the District Court to allow Petitioner to present evidence and argument with regard to its alleged knowledge of the indemnity provision, and the effect thereof.

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2. The District Court's second Final Judgment in favor of Petitioner was entered on March 4, 1993 (App., *infra*, L). The *Page* case was decided on April 7, 1993.

In summary, the Court of Appeals' decision to reverse and remand the judgment without a fact-finding hearing on the issue of Petitioner's alleged knowledge has resulted in a miscarriage of justice. The Court of Appeals' consideration and determination of a fact issue, based on unsubstantiated and uncontroverted deposition excerpts, completely and unjustly deprives Petitioner of the opportunity to develop and present evidence on the knowledge issue at the fact-finding stage of trial. As such, this is a violation of Petitioner's due process right to present evidence on a disputed fact issue.

B. THE COURT OF APPEALS' BELIEF THAT PETITIONER'S NOTICE OR KNOWLEDGE OF THE INDEMNITY PROVISION WAS A DISPOSITIVE ISSUE WAS BASED ON A BLATANT MISINTERPRETATION OF TEXAS LAW

Beyond its error in reversing and rendering judgment against Petitioner based on factual issues not tried in the District Court, the Court of Appeals' belief that a fact issue existed at all was based on a serious misinterpretation of Texas law on indemnity. The Court of Appeals' opinion states that the requirements of conspicuity and express negligence are "not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement." As support for its opinion, the Court of Appeals relies on dicta in a footnote of the *Page* case, which purportedly allows parol evidence to ascertain the intent of the parties to provide for indemnification. Not only did the Court of Appeals misinterpret the *Page* holding, but *Page* also did not change the established and controlling indemnity law as promulgated by the Texas Supreme Court in *Ethyl*.

In *Ethyl*, the Texas Supreme Court adopted the "express negligence" rule, which provides that "parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms" and "*within the four corners of the contract.*" *Ethyl*, 725 S.W.2d at 708 (Emphasis added). An indemnity contract that does not meet this specificity test is construed, as a matter of law, against indemnification. *See Monsanto Co. v. Owens Corning Fiberglas Corp.*, 764 S.W.2d 293, 296 (Tex. App.--Houston [1st Dist.] 1988, no writ). Under *Ethyl*, therefore, the intent to indemnify must be specifically expressed within the contract, and parol evidence is *not* allowed to alter the terms of the contract. Texas courts have consistently followed and employed the express negligence test in determining the validity of indemnity provisions. *See, e.g., Maxus Exploration Co. V. Moran Bros., Inc.*, 817 S.W.2d 50, 56-57 (Tex. 1991); *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990); and *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724, 726 (Tex. 1989).

The *Page* case did not overrule or otherwise alter the dictates of *Ethyl*, but rather, spoke only to the conspicuity prong of the fair notice requirements. Under Texas law, fair notice of an indemnity provision requires (1) that the agreement be conspicuous in the contract and (2) that the intent to indemnify be expressly stated within the four corners of the document [the "express negligence" rule]. If the footnote language in *Page* is isolated from the body of the opinion, it might suggest that the express negligence rule, as well as the conspicuity requirement, can be altered by parol evidence. However, when the opinion is considered in its entirety, it is clear that the *Page* court was only concerned with the conspicuity prong of the fair notice requirements, and did not reach the express negligence issue. *Page*, 853 S.W.2d at 505.

The fallacy of the Court of Appeals' reliance on the *Page* footnote is aptly demonstrated when the facts of that case are considered. There, Page Petroleum Inc. ("Page") hired Dresser Industries, Inc. ("Dresser") to conduct log tests on a well Page had drilled. In their contract, Page promised to indemnify and hold Dresser harmless from all claims for subsurface damage or injury to the well, *even if such claims were based on Dresser's alleged negligence. Page*, 853 S.W.2d at 506-507. One of Dresser's tools got stuck in hole, and Page hired Houston Fishing Tools Co. ("HFTC") to remove the tool. In its contract with HFTC, Page agreed that HFTC would not be liable to Page on any theory of legal liability, *including the sole or concurrent negligence of HFTC*, for any injury of damage to property. *Page*, 853 S.W.2d at 507. Page sued Dresser and HFTC, both of who defended on the basis that the contractual provisions mentioned above relieved them of liability for their own negligence. The jury found that Page's damages were caused in part by its own negligence (50%), in part by HTFC's negligence (40%), and in part by Dresser's negligence (10%). The trial court imposed damages on Dresser and HFTC in proportion to their degree of negligence as found by the jury, and both defendants appealed. *Page*, 853 S.W.2d at 507. The appeals court upheld the award against Dresser (finding that the indemnity language in the Page/Dresser contract did not operate as a release between them), and reversed the award against HFTC, finding that the release language in the Page/HFTC did operate to bar Page's suit against HFTC for negligence.

On further appeal, the Texas Supreme Court affirmed the Court of Appeals' upholding of the award against Dresser, but reversed the court's take-nothing judgment against HFTC. The supreme court declared that releases, like indemnity provisions, must (1) pass the express negligence test, and (2) be conspicuous. *Page*, 853 S.W.2d at 508. Noting that determination of the conspicuousness test

is a question of law for the court, the supreme court found that the release language in the Page/HFTC contract was not conspicuous and was therefore unenforceable. *Page*, 853 S.W.2d at 511.

Although the *Page* court did not address the issue,[3] the release language in the Page/HFTC contract specifically provides for HFTC's release from its own negligence and, therefore, satisfies the express negligence test. Accordingly, *Page* only addressed the conspicuity prong of the fair notice requirements and held that the release language at issue in the Page/HFTC contract was not conspicuous. *Page* clearly did not overrule *Ethyl*. In fact, in footnote 5 of the *Page* opinion, the court acknowledges that *Ethyl*, as well as subsequent Texas Supreme Court opinions, "developed the law and the standards for evaluating compliance" with the express negligence test. *Page*, 853 S.W.2d at 510 n. 5.

In sum, the inference adopted by the Court of Appeals in this case is contrary to and conflicting with established principles of Texas indemnity law and is not supported by the case upon which the court relied.[4] Accordingly, this is not the "exceptional" case where there was a change in the law that would allow the Court of

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3. In footnote 5 on page 510, the *Page* court notes that because it found the provision inconspicuous as a matter of law, it did not have to reach the express negligence issue.

4. While the issue of the Court of Appeals' erroneous interpretation of Texas law is intimately bound up with its more grievous error in depriving Petitioner of its right to procedural due process, Petitioner would also point out that the Court of Appeals' failure to properly follow the dictates of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), provides an independent ground for issuing a writ of certiorari and reversing the Court of Appeals. See, e.g., *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S.Ct. 176 (1940); *Huddleston v. Dwyer*, 322 U.S. 232 (1944).

Appeals to consider for the first time the issue of Petitioner's alleged notice or knowledge of the indemnity provision.

C. NONE OF THE JUSTIFICATIONS FOR RENDERING JUDGMENT ON AN ISSUE NOT TRIED IN THE DISTRICT COURT EXIST IN THIS CASE

There are no exceptional circumstances surrounding this case that would justify the Court of Appeals' determination of a factual issue in order to "promote the ends of justice." *See Hormel*, 312 U.S.at 557. The Court of Appeals made an inference of fact that is directly in conflict with the stipulation of the parties and the findings of the District Court, and is based on a misreading of the applicable law. Therefore, by reversing and remanding this case to the District Court for entry of judgment without a full and complete determination of the intent of the parties to indemnity, the Court of Appeals has deprived Petitioner of its fundamental right to present evidence on a relevant and controverted issue. This is an obvious and blatant miscarriage of justice.

II.
THE QUESTION PRESENTED IS IMPORTANT

Although the constitutional sufficiency of judicial procedures and practices varies with the circumstances, such procedures are evaluated by considering (1) the individual interest at stake, (2) the risk of an erroneous deprivation of that interest through the procedures employed, as well as the use of different or additional procedural safeguards, and (3) the government interest. *Bankers Trust*, 752 F.2d at 887. Here, the individual interest is Petitioner's right to be heard and present evidence on an issue that was not developed at the trial level--a fundamental due process right. Therefore,

by deciding a fact issue on appeal, especially where there were no exceptional circumstances present, and where justice would be served by remanding the cause for an evidentiary hearing, the Court of Appeals deprived Petitioner of its due process right to the fundamental fairness of a trial by jury.

Furthermore, the governmental interest in judicial efficiency brought about by encouraging parties to stipulate to facts without fear of judicial fact finding on issues not known to be controlling at the time of stipulation militates in favor of the exercise of this Court's protections. Finally, the governmental interest in preserving rules of procedure and judicial practice to promote the ends of justice is paramount and should be preserved at all costs.

Accordingly, the question presented here is of utmost importance for the continuation of our constitutional guarantees of a fair judicial process. Courts of Appeal must not be allowed to usurp the judicial function of the trial courts and deprive individuals of the right to be heard and present evidence before a fact-finding tribunal where justice does not demand otherwise. This Court's guidance is needed therefore to remedy the Court of Appeals' grievous errors in this case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BINGHAM & MANN

BY:_____
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APPENDIX A

U.S. COURT OF APPEALS
F I L E D
FEB 22 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2138

ROBERT LEE HAMILTON, ET AL.,

Plaintiffs,

versus

AMOCO PIPELINE COMPANY,

Defendant-Third Party
Plaintiff-Appellant,

versus

WOODSON CONSTRUCTION COMPANY,

Third Party Defendant-
Appellee.

Appeals from the United States District Court
for the Southern District of Texas

(CA h 87 4158)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and STAGG*, District Judge.

PER CURIAM* ★

The district court refused to enforce an indemnity agreement between Woodson Construction Company and Amoco Pipeline Company. Applying Texas law, we REVERSE and REMAND.

I.

Three Woodson employees, including Robert Hamilton, sustained burns while replacing an Amoco pipeline. The workers did not sue Woodson because it had immunity under the Texas workers compensation scheme. Instead they sued Amoco. The lawsuits alleged control of the job site and negligent failure to maintain a safe work environment. Amoco settled the cases for $6,025,000.00.

Woodson intervened in the Hamilton litigation and claimed damage to its equipment. Amoco filed a cross-claim against Woodson to recoup some of the cost of settling with

---

* Senior District Judge of the Western District of Louisiana, sitting by designation.

* ★ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the injured workers. The cross-claim alleged that Woodson should reimburse Amoco according to its proportion of the fault.

Woodson moved for summary judgment because the Texas Worker's Compensation Act immunizes a subscribing employer from indemnity or contribution claims. Woodson also sated that the express negligence test, enunciated in Ethyl v. Daniel, 725 S.W.2d 705 (Tex. 1987), provides that a negligent indemnitee can be indemnified only if the contract expressly provides for it. Woodson alleged that the contract did not expressly state that Amoco would be indemnified for its own negligence.

Amoco did not respond that the contract passed the express negligence test, but argued that it sought indemnity for Woodson's negligence, not for its own share of the fault. The trial court denied summary judgment not because Amoco's negligence remained a fact issue under the express negligence test, but because Woodson's negligence remained in question. Amoco assumed that the court had held that the express negligence test did not apply to the case.

Woodson and Amoco then stipulated that the money Amoco paid to settle the underlying case was necessary and reasonable. They also stipulated that the underlying accident was caused 50% by Woodson's negligence, and 50% by Amoco's negligence. Amoco dismissed a separate lawsuit against Woodson, in which it had argued that Woodson breached a contract with Amoco by failing to have Amoco named as an additional insured on Woodson's insurance policies.

After agreeing on the stipulations, Amoco moved for a judgment awarding it 50% of the amount it had spent settling the underlying claims. Woodson moved for a take-

nothing judgment because Amoco was a negligent indemnitee that could not recover without an express negligence provision in its contract.

This time, the court ruled for Woodson, and, to Amoco's surprise, applied the express negligence test. The court stated that Amoco had stipulated that it was negligent, and that Amoco, as a negligent indemnitee, could not receive indemnification without an express negligence provision. The court found that the contract did not contain the magic words.

Amoco moved for a new trial, arguing that the contract not only contained an indemnity covenant, but also a reimbursement covenant, which is not subject to the express negligence test. In Getty v. Insurance Co. of North America, 845 S.W.2d 705, 708 (Tex. 1987), the Texas Supreme Court had held that a promise to name a party as an additional insured is not subject to the express negligence test.

Amoco also wanted to withdraw its stipulations because the court's second ruling applying the express negligence test conflicted with its first decision that Woodson's negligence remained an unresolved issue, something that would be irrelevant under the express negligence test. Amoco argued that it had relied on the first ruling when it stipulated to partial negligence, and now that the court has changed its mind, the court should allow it to withdraw the stipulation. The court denied the motion. Amoco appealed.

II.

Amoco is not seeking indemnification for its own negligence. Rather, Amoco here seeks to recover for the

cost attributable to the negligence of Woodson, stipulated to be 50%. We see nothing in Texas law to defeat enforceability of this agreement. Assuming, without deciding, that under Ethyl Corp. v. Daniel, 725 S.W.2d 705 (TEX. 1987), Amoco must meet the express negligence test even though it seeks recovery only for Woodson's negligence (indemnification of comparative fault), we find the contract to be enforceable. The Texas Supreme Court in Page Petroleum, Inc. v. Dresser Industries, Inc., 36 Tex. S. Ct. J. 737 (Tex. 1993), concluded that the requirements of conspicuity and expressed negligence are "not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement." Id. at 308 n.2. Louis Woodson testified that he understood the Woodson Construction Company would be liable for its own negligence. This was sufficient because Amoco sought no more.

We need not reach the other issues in this case. The judgment of the district court is REVERSED, and the case is REMANDED for entry of an appropriate judgment.

APPENDIX B

U.S. COURT OF APPEALS
F I L E D
APR 13 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2138

ROBERT LEE HAMILTON, ET AL.,
Plaintiffs,

versus

AMOCO PIPELINE COMPANY,
Defendant-Third Party
Plaintiff-Appellant,

WOODSON CONSTRUCTION COMPANY,
Third Party
Defendant-Appellee.

Appeals from the United States District
Court for the Southern District of Texas

ON PETITION FOR REHEARING
(April 13, 1994)

Before HIGGINBOTHAM, DUHÉ, Circuit Judges, and STAGG* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

* Senior District Judge of the Western District of Louisiana sitting by designation.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-4

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
DEC 14 1990
Jesse E. Clark, Clerk
By Deputy: W. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL, Plaintiffs	§	
v.	§	CIVIL ACTION H-87-4158
AMOCO PIPELINE COMPANY, Defendant	§	

ORDER

Pending before the Court is the Motion for Summary Judgment (Document #99) filed by the cross-defendant Woodson Construction Company ("Woodson") seeking summary judgment on the cross-action filed against it by defendant/cross-plaintiff Amoco Pipeline Company ("Amoco"). After having considered the motion, the submissions of the parties, and the applicable law, the Court

ORDERS that Woodson's motion for summary judgment (Document #99) is DENIED.

SIGNED at Houston, Texas, on this the 12 Dec., 1990.

David Hittner

DAVID HITTNER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 20 1991
Jesse E. Clark, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL., Plaintiffs,	§	
V.	§	CIVIL ACTION
	§	H-87-4158
AMOCO PIPELINE COMPANY, Defendant.	§	

ORDER

Pending before the Court are the Joint Request for Ruling (Document #133) and the Joint Motion to Pass Trial Setting (Document #146) filed by third-party defendant Woodson Construction Company ("Woodson") and defendant Amoco Pipeline Company ("Amoco"). Additionally pending is the Joint Motion for Judgment filed by Amoco and plaintiffs. This Court has considered the motions and the applicable law and determines that the joint request for ruling should be granted, that ruling upon the joint motion to pass trial setting should be withheld, and that the joint motion for judgment should be granted.

In their joint request for ruling, Woodson and Amoco ask this Court to provide clarification of its prior ruling denying Woodson"s motion for summary judgment (Document #129) in order to "enhance the prospects of settlement or resolution of [the] case without the necessity of a full trial." Document #133, p.2. Based upon this representation, the Court determines that the motion should be granted. Therefore, this Court advises the parties that the material question of fact which this Court previously determined prevented the grant of judgment as a matter of law is: What percentage, if any, of the injuries suffered by plaintiff Robert Lee Hamilton ("Hamilton") were caused by the negligence of Woodson.

Additionally, this Court determines that ruling upon the joint motion to pass should be withheld. Counsel should appear for Docket Call on September 30, 1991, at 10:00 a.m. as previously order (Document #145) at which time counsel should be prepared to advise the status of this case.

Finally, through their joint motion for judgment, Amoco and plaintiffs as this Court to enter a take-nothing judgment with regard to the claims asserted by plaintiffs against Amoco in accordance with the settlement reached between those parties. This Court determines that the motion should be granted. Based upon the foregoing, it is

ORDERED that Woodson and Amoco's Joint Request for Ruling (Document #133) is GRANTED. It is further ORDERED that ruling upon Woodson and Amoco's Joint Motion to Pass Trial Setting (Document #146) is WITHHELD until September 30, 1991. It is additionally ORDERED that Amoco and Plaintiffs' Joint Motion for Judgment (Document #134) is GRANTED. Plaintiffs' shall TAKE NOTHING with regard to their claims against Amoco.

SIGNED at Houston, Texas, on this the 27 day of September, 1991.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX E

United States District Court
Southern District of Texas
Filed
Sep 28 1992
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL	§	
	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

STIPULATIONS OF FACT

1. Robert Hamilton, Raywood Frederick and Arthur Thomas were injured on or about September 9, 1987, in Kemah, Galveston County, Texas.

2. At the time of the accident, Hamilton, Frederick and Thomas were employed by Woodson Construction Company (Woodson), a subscriber to worker's compensation pursuant to the Texas Workers Compensation Act. Hamilton, Frederick and Thomas received worker's compensation benefits from Woodson's worker's compensation carrier.

3. When they were hurt, Hamilton, Frederick and Thomas were working on a job Woodson was performing for Amoco Pipeline Company (Amoco) pursuant to a contract,

executed prior to September 9, 1987, which said, in part:

> The Contractor [Woodson] shall indemnify and save Company [Amoco] harmless from and against any and all losses, claims, demands, liabilities, suits or actions (including all reasonable expenses and attorney's fees) for injuries to or the death of any person or persons, including the employees of each party hereto and the employees of their subcontractors, . . . caused by or resulting from the negligence of the Contractor or any of its subcontractors or the employees of either, or from poor, improper or unworkmanlike performance of any of the work to be performed hereunder, or by materials (except such as Company may have furnished) used in said work which are defective, BB JF* ~~hereunder~~, or by reason of any other thing in connection with the performance of this Contract and the Contractor agrees to reimburse Company for all sums which Company may pay or be compelled to pay in settlement of any claim on account thereof, including any claim under the provisions of any worker's compensation law or other similar law, or under any plan for employees' benefits which Company may have or adopt, except that the Contractor assumes no liability for the sole negligent acts of Company, its agents, servants or employees.

*Initialed as approved, per authorization of J. Kimmitt

4. Hamilton, Frederick and Thomas sued Amoco, asserting that their injuries were caused through acts and conduct for which Amoco was allegedly responsible. They did not and could not sue Woodson.

5. Amoco entered into a settlement agreement with Hamilton, Frederick and Thomas in which it incurred damages by virtue of the settlement in the amount of $6,025,000, in return for which Amoco secured a full and complete release.

6. The settlement agreement and the amount Amoco paid thereunder were reasonable and prudent under the circumstances.

7. The incident on which Hamilton, Frederick and Thomas based their claim against Amoco was caused 50% by the negligence of Woodson and 50% by the negligence of Amoco.

8. These stipulations are binding only upon Woodson Construction Company and Amoco Pipeline Company and shall have no effect on any other parties and are limited only to this action.

DATED this 28 day of September, 1992.

AMOCO PIPELINE COMPANY

BY: /s/ illegible
ITS: Attorney of Record

WOODSON CONSTRUCTION COMPANY

BY: /s/ illegible
ITS: Attorney of Record

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
OCT 14 1992
Michael N. Milby, Clerk
By Deputy: W. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-87-4158
AMOCO PIPELINE COMPANY Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Robert Lee Hamilton ("Hamilton") instituted this action against defendant Amoco Pipeline Company ("Amoco"), for injuries sustained when a pipe on which Hamilton was working exploded. Amoco filed a cross-claim against Hamilton's employer, Woodson Construction Company ("Woodson"), for indemnity and/or contribution. Amoco and Hamilton executed a settlement agreement pursuant to which Amoco paid Hamilton $6,025,000. The only issue remaining in this lawsuit is whether Amoco is entitled to indemnity and/or contribution from Woodson. In lieu of a trial, the parties have requested that the Court issue conclusions of law and enter a judgment based on the stipulations of fact submitted by the parties on September 26,

1992 (Documents #163 & 164). On that basis, this Court adopts in toto the parties' stipulations of fact. Having considered the stipulated facts and the applicable law, this Court enters the following conclusions of law.

CONCLUSIONS OF LAW

1. Indemnification is the shifting of the entire loss from one party to another. See W.R.Grace v. Scotch Corp., Inc., 753 S.W.2d 743, 747 (Tex.App. - Austin 1988, writ denied).

2. A party is entitled to indemnification either by common law or by contractual agreement. Hardy v. Gulf Oil Corp., 949 F.2d 826, 830 (5th Cir. 1992).

3. Common law indemnity is inapplicable to the instant case because it applies only in cases of products liability and vicarious liability. Id.

4. A contractual indemnification clause must meet the express negligence test which provides that "parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms." Ethyl Corp. v. Daniel Construction Co., 725 S.W.2d 705, 708 (Tex. 1987).

5. The contractual provision at issue does not meet the express negligence test because it specifically provides for indemnity only in the case of Woodson's negligence. See Stipulations of Fact #3.

6. Amoco is not entitled to comparative indemnity for 50% of the amount paid to Hamilton because the contract does not contain a provision for contractual comparative indemnity Ethyl Corp., 725 S.W.2d at 708.

7. Under Texas law, "[a] settling tortfeasor has no right of contribution against nonsettling tortfeasors." Jackson v. Freightliner Corp., 938 F.2d 40, 41 (5th Cir. 1991). See also Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987).

8. Amoco and Woodson are joint tortfeasors because both parties have stipulated that Hamilton's injuries were caused 50% by Amoco's negligence and 50% by Woodson's negligence. See Stipulations of Fact #7.

9. Since Amoco has settled with Hamilton, Amoco is not entitled to any contribution from Woodson for the settlement amount paid to Hamilton. Jackson, 938 F.2d at 41.

Based on the foregoing it is ORDERED that judgment be entered in favor of third-party defendant Woodson. Therefore, Amoco takes nothing from Woodson.

All relief not specifically granted herein is DENIED.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas on this 9 day of October, 1992.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
NOV 09 1992
Michael N. Milby, Clerk
By Deputy: B. Jarmon

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

	*	
HAMILTON	*	
	*	
V	*	CIVIL ACTION NO.
	*	H-87-4158
AMOCO PIPELINE CO.	*	
	*	

ORDER

Parties are advised that a hearing will be held on November 30, 1992, at 9:15 a.m., Courtroom 8A, 515 Rusk, Houston Texas. Counsel should at that time be prepared to address Defendant Amoco's Motion for New Trial or to Alter or Amend Judgment (#168). The Clerk will mail a copy to all counsel of record.

SIGNED at Houston, Texas, this 4 of Nov, 1992.

/s/ David Hittner
DAVID HITTNER
U.S. DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
DEC 24 1992
Michael N. Milby, Clerk
By Deputy: W. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	H-87-4158
AMOCO PIPELINE COMPANY,	§	
Defendant.	§	

ORDER

Pending before the Court is the motion to correct clerical mistake in judgment (Document #172) filed by third-party defendant Woodson Construction Company ("Woodson"). Having considered the motion the Court determines that the motion should be granted.

On October 9, 1992, this Court issued Findings of Fact and Conclusions of Law (See Document #166) in the above referenced matter. That order failed to reflect that Raywood Frederick ("Frederick") and Arthur Thomas ("Thomas") were co-plaintiffs of Robert Lee Hamilton ("Hamilton") and that all three plaintiffs, Hamilton, Frederick and Thomas, were parties to the settlement

agreement with Amoco Pipeline Company ("Amoco"). Therefore, it is

ORDERED that the motion to correct clerical mistake in judgment (Document #172) is GRANTED. It is further ORDERED that the Findings of Fact and Conclusions of Law issued by this Court on October 9, 1992, are amended to reflect the following:

(1) the instant lawsuit was instituted by three plaintiffs, Hamilton, Frederick and Thomas;

(2) Hamilton, Frederick and Thomas joined in the settlement agreement with Amoco;

(3) Amoco is not entitled to comparative indemnity for the amount paid to Hamilton, Frederick and Thomas;

(4) Amoco and third-party defendant Woodson are joint tortfeasors because they have stipulated that the injuries sustained by Hamilton, Frederick and Thomas were caused 50% by Amoco's negligence and 50% by Woodson's negligence; and

(5) Amoco is not entitled to contribution from Woodson for the settlement amount paid to Hamilton, Frederick and Thomas.

SIGNED at Houston, Texas on this 23 day of December, 1992.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
DEC 24 1992
Michael N. Milby, Clerk
By Deputy: W. Smith

ROBERT LEE HAMILTON, ET AL, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-87-4158
AMOCO PIPELINE COMPANY Defendant	§	

ORDER

Pending before the Court is the motion for new trial or to amend or alter judgment (Document #168) filed by defendant and third-party plaintiff Amoco Pipeline Company ("Amoco"). Having considered the motion, the submissions and the applicable law, the Court determines that the motion should be denied.

Plaintiffs, Robert Lee Hamilton, Raywood Frederick and Arthur Thomas (collectively "plaintiffs"), instituted this action against defendant Amoco for injuries sustained when a pipe on which plaintiffs were working exploded. Amoco filed a cross-claim against plaintiffs' employer, Woiodson Construction Company ("Woodson"), for indemnity and/or conrtribution. Amoco and plaintiffs executed a settlement agreement pursuant to which Amoco paid plaintiffs $6.025,000. Amoco proceeded with its cross-claim and sought to recover a portion of the settlement amount from Woodson through indemnification or contribution.

By order dated October 9, 1992, (See Document #166) this Court held that Amoco was entitled to neither indemnity nor contribution from third-party defendant Woodson. This Court determined that Amoco was not entitled to indemnity from Woodson because the indemnification provision in the contract between Amoco and Woodson did not satisfy the express negligence test enunciated in Ethyl Corp. v. Daniel Construction Co., 725 S.W.2d 705, 708 (Tex. 1987). This Court further determined that the contract between Amoco and Woodson did not provide for comparative indemnification and, therefore, Amoco was not entitled to comparative indemnity for 50% of the amount paid to plaintiffs pursuant to the settlement agreement. Id. Finally, this Court held that Amoco, as a settling joint tortfeasor, had no right of contribution against Woodson, a nonsettling joint tortfeasor. Jackson v. Freightliner Corp., 938 F.2d 40, 41 (5th Cir. 1991).

On October 26, 1992, Amoco filed the instant motion for a new trial or to amend or alter judgment. Amoco argues that it is seeking reimbursement, not indemnification, and that the express negligence rule does not apply to a contractual provision for reimbursement. Amoco further contends that by denying Woodson's motion for summary judgment (See Document #129 & #147), this Court implicitly held that Amoco was entitled to reimbursement from Woodson.

The labeling of the relief sought as "reimbursement,"[1] rather than indemnification, does not give rise to a new and independent ground for relief. Whether the

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[1] The definition of reimburse is "[t]o pay back, to make restoration, to repay that expended; to indemnify, or make whole." Black's Law Dictionary 1287 (6th ed. 1990) (citation omitted).

requested relief is termed as indemnification, contribution or reimbursement, Amoco must still establish a basis upon which it is entitled to that relief. In the instant action, Amoco has shown no other bases than indemnification and contribution that would entitle it to reimbursement for the amounts paid to plaintiffs pursuant to the settlement agreement. "Reimbursement" is not an independent legal theory under which Amoco may recover the settlement amount representing Woodson's proportionate liability. See W.R. Grace Co. v. Scotch Corporation, Inc., 753 S.W.2d 743, 747 n.3 (Tex. App. - Austin 1988).

Further, the reimbursement provision in the contract between Amoco and Woodson does not provide an independent basis for recovery. Amoco apparently confuses the meaning of reimbursement and contribution, which are often used interchangeably in the law. See e.g., International Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932 (Tex. 1988). Thus, absent a showing of the right to indemnification or contribution, Amoco has no basis upon which it is entitled to reimbursement from Woodson. Hence, there are no new grounds to disturb this Court's ruling that Amoco is not entitled to indemnification or contribution from Woodson.

Additionally, this Court's prior ruling denying summary judgment for Woodson does not contradict this Court's Findings of Fact and Conclusions of Law granting judgment for Woodson. The propriety of summary judgment is dependent upon the existence of genuine issues of material fact. As Woodson correctly points out in its brief in opposition to the instant motion, the material fact issue precluding summary judgment in the instant action was whether Woodson was 100% negligent. That factual issue was material because a finding that Woodson was 100% negligent would entitle Amoco to 100% indemnification from

Woodson. On the other hand, if, as the parties subsequently stipulated, Woodson were less than 100% negligent, Amoco would not be entitled to indemnification or contribution from Woodson for the reasons set forth in this Court's Findings of Fact and Conclusions of Law. Amoco simply misinterpreted this Court's denial of summary judgment, and that is an insufficient basis on which to amend or alter a judgment in conformity with the law.

Based on the foregoing, it is

ORDERED that the motion for a new trial or to amend or alter judgment (Document #168) is DENIED.

SIGNED at Houston, Texas on this 23 day of December, 1992.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JAN 21 1993
Michael N. Milby, Clerk
By Deputy: W. Smith

ROBERT LEE HAMILTON,	§	
ET AL,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	H-87-4158
AMOCO PIPELINE COMPANY,	§	
Defendant.	§	

ORDER

Pending before the Court is the motion for relief from judgment (Document #180) filed by defendant and third-parety plaintiff Amoco Pipeline Company ("Amoco"). Through this motion, Amoco seeks relief from this Court's findings of facts and conclusions of law (Document #166) in favor of third-party defendant Woodson Construction Company ("Woodson").

In its motion for relief from judgment, Amoco states that "[t]o the astonishment of all parties, the Court adopted Woodson's proposed judgment." (See Document #180, at 5). Further, Amoco contends that both Amoco and Woodson interpreted this Court's denial of Woodson's motion for summary judgment as an implied holding that Amoco would necessarily be entitled to recover an amount proportionate to Woodson's negligence. (See Document #180), at 2). This Court direst Woodson to specifically address these assertions

in its response to Amoco's motion. Accordingly, it is

ORDERED that Woodson file a response specifically addressing Amoco's contentions concerning Woodson's interpretation of this Court's rulings in the instant third-party action.

SIGNED at Houston, Texas, on this 20 day of January, 1993.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR - 1 1993
Michael N. Milby, Clerk
By Deputy: W. Smith

ROBERT LEE HAMILTON, ET AL,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	H-87-4158
AMOCO PIPELINE COMPANY	§	
Defendant.	§	

ORDER

Pending before the Court is the motion for relief from judgment (Document #180) filed by defendant and third-party plaintiff Amoco Pipeline Company ("Amoco"). Through this motion, Amoco seeks relief from this Court's findings of facts and conclusions of law (Document #166) in favor of third-party defendant Woodson Construction Company ("Woodson"). Having considered the motion, the submissions and the applicable law, the Court determines that the motion should be denied. Therefore, the Court reaffirms its judgment in favor of Woodson based on the reasons set forth in this Court's findings of fact and conclusions of law and this Court's order denying the motion to amend or alter judgment. Accordingly, it is

ORDERED that the motion for relief from judgment (Document #180) is DENIED.

SIGNED at Houston, Texas, on this 26 day of February, 1993.

/s/ David Hittner
DAVID HITTNER
United Staes District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ENTERED
MAR - 4 1993
Michael N. Milby, Clerk
By Deputy: W. Smith

ROBERT LEE HAMILTON,	§	
ET AL,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION
	§	H-87-4158
AMOCO PIPELINE COMPANY,	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with this Court's findings of fact and conclusions of law granting judgment in favor of third-party defendant Woodson Construction Company ("Woodson"), this Court ORDERS that judgment be entered in favor of Woodson on the claims asserted by defendant and third-party plaintiff Amoco Pipeline Company.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this the 3 day of March, 1993.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JUN 2 1994
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL, Plaintiff,	§	
v.	§	CIVIL ACTION
	§	H-87-4158
AMOCO PIPELINE COMPANY, Defendant.	§	

FINAL JUDGMENT

Pursuant to the directive of the Fifth Circuit Court of Appeals, the Court hereby ORDERS that judgment be entered in favor of Amoco Pipeline Company ("Amoco") on its cross-claim against Woodson Construction Company ("Woodson") for indemnity and/or contribution. It is further ORDERED that Amoco recover from Woodson' judgment for $3,012,500.00 representing Woodson's proportionate share of liability and post-judgment interest on the foregoing amount at the statutory rate of 5.28 % from the date of the entry of this judgment until paid.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this the 31 day of May 1994.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX N

United States District Court
Southern District of Texas
FILED
Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL	§	
	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	
AMOCO PIPELINE COMPANY	§	

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WOODSON CONSTRUCTION COMPANY, Cross-Defendant herein, and moves for Summary Judgment on the Cross-Action which has been filed against it by AMOCO PIPELINE COMPANY, pursuant to the provisions of Rule 56, Federal Rules of Civil Procedure, and as grounds for this Motion would respectfully show this Court as follows:

I.

Attached as Exhibit "A" is the Cross-Action which has been filed against WOODSON CONSTRUCTION COMPANY, movant, by AMOCO PIPELINE COMPANY. The Cross-Action makes it clear that it asserts contribution

and indemnity rights allegedly based upon a contract which is attached to the Cross-Action as Exhibit "A." Movant would show this Honorable Court that neither common law nor the contract in question entitle AMOCO PIPELINE COMPANY to assert the Croaa-Action in question and that accordingly Movant is entitled to Judgment as a matter of law, dismissing same.

II.

2.1 This action arises out a pipeline fire and explosion which occurred on September 9, 1987, in Kemah, Texas. As Cross-Plaintiff acknowledges, Plaintiff ROBERT HAMILTON was an employee of WOODSON CONSTRUCTION COMPANY at the time of the incident, acting within the course and scope of his employment. Plaintiff ROBERT HAMILTON has alleged that he was severely injured during the incident and consequently Plaintiff has sued AMOCO PIPELINE COMPANY, Cross-Plaintiff, who owned the pipeline.

2.2 Almost two years after the accident in question, AMOCO PIPELINE COMPANY filed a Motion with this Court seeking leave to join WOODSON CONSTRUCTION COMPANY as a Cross-Defendant and file a Cross-Action against it. The Cross-Action seeks both contribution and indemnity.

III.

CONTRIBUTION

3.1 AMOCO's contribution claim is invalid. There is no provision in the contract between AMOCO and WOODSON for contribution. Therefore, any such claim must be based upon some perceived right to common law contribution.

3.2 Plaintiff ROBERT HAMILTON was an employee of WOODSON on the date of the fire and explosion. AMOCO PIPELINE COMPANY has acknowledge this in both its Answer and its Cross-Action. Accordingly, any claim for common law contribution is barred by the Texas Worker's Compensation Act. Tex. Rev. Civ. Stat. Ann., Article 8306, Section 3. Specifically:

> The employees of a subscriber...shall have no right of action against their employer...for damages for personal injuries...but such employee...shall look for compensation solely to the association, as the same is hereinafter provided for.

It is undisputed that WOODSON CONSTRUCTION COMPANY as a "subscriber" within the terms of the Act.

3.3 Accordingly, AMOCO does not have a valid claim for contribution against WOODSON.

IV.

INDEMNITY

4.1 The only other basis for AMOCO's Cross-Claim is alleged contractual indemnity. The contractual "indemnity" clause in question reads as follows:

> The contractor [Woodson] shall indemnify and save company [Amoco] harmless from and against any and all losses, claims, demands, liabilities, suits or actions persons, including the employees of each party hereto and the employees of their subcontractor ... caused by or resulting from the negligence of the

> contractor [Woodson] or any of its subcontractors or the employees of either, or from poor, improper or unworkmanlike performance of any of the work to be performed hereunder, or by materials (except such as company [Amoco] may have furnished) used in said work which are defective, or by reason of any other thing in connection with the performance of this contract and the contractor [Woodson] agrees to reimburse company [Amoco] for all sums which company [Amoco] may pay or be compelled to pay in settlement of any claim on account thereof ... except that contractor [Woodson] assumes no liability for the sole negligent acts of company [Amoco] its agents, servants or employees.

4.2 Indemnity contracts in Texas are to be construed under the "express negligence" doctrine. Ethyl Corporation v. Daniel Construction Company, 725 S.W.2d 705 (Tex. 1987). As the Texas Supreme Court has noted:

> The express negligence doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of contract.

In this diversity suit, the "decisions of Texas courts control." Gulf Oil Corporation v. Burlington Northern Railroad, Inc., 751 F.2d 746, 748 (5th Cir. 1985). Accordingly, this Honorable Court should apply the Texas "express negligence" doctrine in construing the enforceability of AMOCO's contract with WOODSON.

4.3 In a similar situation, the Texas Supreme Court was confronted with the following indemnity language:

> Contractor agrees to ... indemnify ...owner ... from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... excepting only claims arising out of accidents resulting from the sole negligence of owner.

The Court ruled that this language did not meet the express negligence test. Singleton v. Crown Central Petroleum Corp., 729 S.W.2d 690 (Tex. 1987). In a subsequent case, the Supreme Court clarified its ruling in Singleton by noting that the deficiency in the indemnity contract in question was its complete failure to state, in specific terms, that the contractor would indemnify the owner for the owner's negligence. Atlantic Richfield Company v. Petroleum Personnel, Inc., 768 S.W.2d 724 (Tex. 1989). As another court noted:

> The agreement in Singleton failed to meet the express negligence test, because it contained no direct language stating the parties intended that the contractor would indemnify owner for the consequences of the owner's own negligence. Rather, it could, at best, only be inferred that such was the parties' intent because the language stated that the only accidents for which indemnity will not apply are those arising out of the owner's sole negligence.

Gulf Oil Corporation v. Ford, Bacon and Davis, Texas, Inc., 782 S.W.2d 28 (Tex. App. - Beaumont 1989, no writ).

4.4 Similarly, the Supreme Court has construed the following indemnity language to be insufficient under the "express negligence" test:

> Contractor agrees to indemnify and save owner harmless from any and all loss sustained by owner by reason of damage to owner's property or operations, and from any liability or expense on account of property damage or personal injury (including death resulted therefrom) sustained or alleged to have been sustained by any person or persons, including but not limited to employees of owner, contractor and subcontractors, arising out of or in any way connected with or attributable to the performance or nonperformance of work hereunder by contractor, its subcontractors and their respective employees and agents, or by any act or omission of contractor, its subcontractors, and their respective employees and agents, or by any act or omission of contractor, its subcontractors, and their respective employees and agents while on owner's premises or by defects in material or equipment furnished hereunder ....

Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc., 739 S.W.2d 239 (Tex. 1987).

4.5 In short, under Texas law a contract must make specific reference to the indemnitee's "negligence" in connection with the obligation to indemnify, and cannot leave

that matter up to implication. Where a contract contains language specifically providing for indemnity for the "negligence" or for any "negligent act or omission" of the party being indemnified, then it may be enforceable, as in Atlantic Richfield Co. v. Petroleum Personnel, Inc., supra. Where, on the other hand, the contract is devoid of reference to the rights and obligations between the parties in the event of concurrent negligence, as is the case alleged by Cross-Plaintiff here, it must fall. Singleton v. Crown Central Petroleum Corp., supra.

4.6 In the instanct case, the contract between AMOCO and WOODSON does not meet the "express negligence" test. The contract does not refer to "negligence" except in connection with WOODSON (and the "sole negligence" of AMOCO). The contract does not address, or indeed even imply, what is to occur in the event AMOCO is "negligent" (but not "solely negligent"). The contract, then, is not enforceable.

V.

INDEMNITY FOR WOODSON'S ALLEGED NEGLIGENCE

5.1 AMOCO's Cross-Claim implies that AMOCO is seeking indemnity for only damage caused by WOODSON's alleged negligence. On the other hand, AMOCO has not been sued for WOODSON's alleged negligence. Plaintiff's complaint does not allege that WOODSON was negligent, and Plaintiff is barred by law from seeking recovery for the alleged negligence of his employer, WOODSON, or his co-workers. Tex. Rev. Civ. Stat. Ann., Article 8306, Section 3.

5.2 Indeed, the issue of WOODSON's alleged negligence, or that of a co-employee, cannot even be submitted to the jury. Varela v. American-Petrofina Company of Texas, Inc., 658 S.W.2d 561 (Tex. 1983).

5.3 The foregoing illustrates that AMOCO has not and cannot be sued or held liable for WOODSON's alleged acts or omissions. As there is no claim of this nature being asserted against AMOCO, AMOCO is not entitled to seek contribution or indemnity for the claim which has been asserted.

VI.

6.1 The foregoing illustrates that as a matter of law AMOCO's Cross-Action must fall and Judgment must be entered in favor of WOODSON CONSTRUCTION COMPANY. AMOCO has no common law right of contribution against WOODSON, by virtue of the fact that HAMILTON was an employee of WOODSON, a subscriber under the Texas Worker's Compensation Act, and was injured while in the course and scope of his employment. AMOCO has no contractual right to contribution or indemnify because the contract between the parties fails to meet the "express negligence" test as set forth by the Supreme Court by Ethyl Corporation v. Daniel Industries, supra. There being no basis for the cause of action which has been asserted, the claim must fail.

6.2 The foregoing illustrates that there is no genuine issue of material fact in connection with the claim which AMOCO asserted against WOODSON, and that that claim must be dismissed, with Judgment entered in favor of WOODSON CONSTRUCTION COMPANY.

WHEREFORE, PREMISES CONSIDERED, Cross-Defendant, WOODSON CONSTRUCTION COMPANY respectfully requests that Summary Judgment be entered in its favor and against AMOCO PIPELINE COMPANY on the Cross-Action which has been filed against it by AMOCO PIPELINE COMPANY, and that WOODSON CONSTRUCTION COMPANY be dismissed from this case with its costs. Cross-Defendant further prays for such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

NELSON & BINGHAM
BY: /s/ Bradley M. Bingham
BRADLEY M. BINGHAM
Federal ID No. 838
State Bar No. 02322400
5177 Richmond Avenue
Suite 660
Houston, Texas 77056
(713) 850-1724
ATTORNEY IN CHARGE FOR CROSS-DEFENDANT WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this the 22 day of June, 1990.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

E:\1/59

APPENDIX O

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUL 13 1990
Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON and	§	
GWENDOLYN MARIE	§	
HAMILTON, Individually and	§	
as Next Friend of Minors,	§	
CLINTON HAMILTON and	§	
AMBER HAMILTON, and	§	
CHESTER HAMILTON and	§	
EVELYN HAMILTON	§	**C. A. NO.**
	§	**H-87-4158**
VS.	§	
	§	
AMOCO PIPELINE COMPANY	§	

DEFENDANT AND CROSS-PLAINTIFF AMOCO PIPELINE'S RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT OF CROSS-DEFENDANT WOODSON CONSTRUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, AMOCO PIPELINE COMPANY, CROSS-PLAINTIFF, and DEFENDANT herein, and files this Response to the Motion for Summary Judgment of Cross-Defendant Woodson Construction Company (hereinafter "Woodson"), and in support thereof respectfully asserts the following:

I.

SUMMARY OF ARGUMENT

1. Cross-Defendant Woodson has waived its immunity to third party suit pursuant to the Amoco-Woodson Agreement whereby Woodson agreed to indemnify Amoco for its [Woodson's] negligence.

2. Ethyl and the "express negligence test" pertain to situations where the indemnitee seeks indemnity from the consequences of its own negligence. In the case at bar, Amoco seeks indemnity for the consequences of the indemnitor's negligence and thus Ethyl as well as the other cases cited by Cross-Defendant is not applicable and does not bar this claim.

3. In the alternative, assuming that the court finds Ethyl applicable and further that the language used in the Amoco-Woodson Agreement fails to satisfy the "express negligence test," Amoco requests that the Court reform the contract so that it satisfies Ethyl and correctly expresses the true intent and agreement of the parties. The deposition testimony of Louis Woodson unequivocally establishes that Woodson intended to

indemnify Amoco for Woodson's own negligence. Any language in the contract producing a contrary effect was the result of mistake and thus the equitable powers of the Court may be invoked to reform the agreement.

4. In addition to agreeing to indemnify Amoco for its own [Woodson's] negligence, Woodson has also agreed to indemnify Amoco from losses occurring due to Woodson's improper, poor and unworkmanlike performance under the contract. Such an indemnity claim is not based on negligence and therefore, Ethyl and its progeny are not applicable.

5. The Plaintiff's Complaint does not govern Amoco's Cross-Action against Woodson. Amoco's Cross-Action against Woodson is not derivative of any action the Plaintiff has against Woodson and is thus not subject to the worker's compensation bar. In addition, Woodson has contractually waived any immunity it has to a negligence or indemnity suit by Amoco.

II.

WOODSON HAS WAIVED IMMUNITY FROM THIRD PARTY SUIT PURSUANT TO AMOCO-WOODSON CONTRACT

On page 2 of its Motion for Summary Judgment, Woodson asserts that any contribution claim brought against it by Amoco is barred by the Texas Worker's Compensation Act. To the contrary, it is well settled that the Texas

Worker's Compensation Act does allow third party suits against subscribing employers of injured employees where the employer has waived its immunity under the Act pursuant to a written agreement with the third party plaintiff. The Act specifically states:

> [N]or shall the subscriber ...have any tort or contract liability for damages to such other person because of such judgment or settlement, in the absence of a written agreement expressly assuming such liability, executed by the subscriber prior to the injury or death.

Tex. Rev. Civ. State Ann. art. 8036(b) (Vernon Supp. 1989). Case law interpreting the Act is in accord.[1] Woodson clearly waived its immunity to a third party suit by agreeing to the "Liability and Insurance" section of the Amoco-Woodson contract as noted on page 3 of Woodson's Motion for Summary Judgment, and also attached hereto as Exhibit "A."

III.

AMOCO'S INDEMNITY CLAIM AGAINST WOODSON IS NOT PRECLUDED BY ETHYL AND THE EXPRESS NEGLIGENCE TEST

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[1] See, e.g., Barnes v. Lonestar Steel Co., 642 F.2d 993, 994 (5th Cir. 1981) (Texas worker's compensation law does not preclude a suit by a third party against an employer where the employer executed a written indemnity agreement prior to the employee's injury; Charter Builders v. Durham, 683 SW.2d 487, 491 (Tex. App. --Dallas 1984, writ ref. n.r.e.) ("Although the worker's compensation law precludes a suit by Durham against his employer, it does not preclude a third party's indemnity claim against the employer pursuant to a written indemnity agreement.").

As noted by Woodson in its Motion for Summary Judgment, the pertinent indemnity clause in the Amoco-Woodson Agreement is as follows:

> Section X - Liability and Insurance
>
> The contractor [Woodson] shall indemnify and save company [Amoco] harmless from and against any and all losses, claims, demands, liabilities, suits or actions (including all reasonable expenses and attorneys' fees) for injuries to or the death of any person or persons, including the employees of each party hereto and the employees of the subcontractors, or for the loss or damage to the property of any person or persons, including the property of subcontractors, or for the loss of or damage to the property of any person or person, including property of the company [Amoco] caused by or resulting from the [1] negligence of the contractor [Woodson] or any of its subcontractors or the employees of either, or [2] from poor, improper or unworkmanlike performance of any of the work to be performed hereunder, or [3] by materials, (except such as company may have furnished) used in said work which are defective, or [4] by reason of any other thing in connection with the performance of this contract and the contractor [Woodson] agrees to reimburse for all sums which company [Amoco] may pay or be compelled to pay in settlement of any claim on account thereof, including any claim under the provisions of any worker's compensation law or any similar law, or under any plan for

> employee's benefits which company [Amoco] may have or adopt, except that contractor [Woodson] assumes no liability for the sole negligent of company, its agents, servants or employees.

(Amoco-Woodson Agreement, Section X at page 6, brackets added).

In Section 4.2 of its Motion, Woodson asserts that Amoco's indemnity claim is precluded by the "express negligence doctrine" developed in Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987). As noted by the Cross-Defendant, the express negligence doctrine applies where an indemnitee is seeking to be indemnified from the consequences of its own negligence. (Woodson's Motion at Section 4.2). Ethyl, as well as all the cases cited by Cross-Defendant, does not pertain to situations where the indemnitee seeks indemnity from the consequences of the indemnitor's negligence. [2] Ethyl does not apply to situations where the indemnitee seeks indemnity for the consequences of the indemnitor's negligence. This distinction was made clear in Continental Steel Company v. H. A. Lott, Inc., 772 S.W.2d 513 (Tex. App. -- Dallas 1989, writ dism'd), wherein the court noted:

> [T]he Ethyl court addressed only liability for the indemnitee's own negligence, whether

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[2] See, e.g., Singleton v. Crown Central Petroleum Corp., 729 SW.2d 690 (Tex. 1987) (Cross-Defendant's Motion at page 4); Atlantic Richfield Company v. Petroleum Personnel, Inc., 768 SW.2d 724 (Tex. 1989) (Cross-Defendant's Motion at page 5); Gulf Oil Corp. v. Ford, Bacon & Davis, Texas, Inc., 782 SW.2d 28 (Tex. App. --Beaumont, 1989, no writ); Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc., 739 SW.2d 239 (Tex. 1987) (cited in Cross-Defendant's Motion at page 5). Copies of these cases are attached hereto for the Court's convenience.

> sole, joint, or concurrent. . . . The Supreme Court has not addressed the question or whether the expressed negligence rule applies when the indemnitee has been found not negligent. For the following reasons, we decline to extend this rule to indemnity provisions covering losses which do not result from the indemnitee's negligence.

Continental Steel at 515 (emphasis added).

In the instant case, Amoco is asserting an indemnity claim for the consequences of the indemnitor's [Woodson's] negligence, not the indemnitee's negligence. Thus the "express negligence" test of Ethyl does not operate to bar such a claim. Even if Amoco does not have an indemnity claim for its own negligence, if any, it still has a valid indemnity claim for the negligence of its contractor, Woodson.

Nor is there any doubt as to Woodson's intent to indemnify Amoco for its own [Woodson's] negligence. This intent is expressly stated in the Amoco-Woodson Agreement:

> The contractor [Woodson] shall indemnify and save company [Amoco] harmless from and against any and all losses caused by or resulting from the negligence of the contractor [Woodson] or any of its subcontractors or the employees of either.

(Amoco-Woodson Agreement, supra at 2.)

The deposition testimony of Louis Woodson, President of Woodson Construction Company and signatory to the Amoco-Woodson Agreement, unequivocally states that

pursuant to the contract, Woodson fully intended to indemnify Amoco for Woodson's own negligence:

Q: What does it [Section X of Amoco-Woodson Agreement] mean to you?

A: It means that I am going to hold Amoco - anybody-Woodson would hold liable - will hold you harmless for any work that we do if it is our negligence, if we were negligent. That is what it says.

Q. To who? That's the phrase I was reading, who would you -

A. To the company, which is Amoco.

Q. For any injuries or damages or whatever?

A. Yes. If it is our fault.

Q. And I assume that you meant to live up to that obligation to Amoco harmless?

A. I always do. That is the way I built my business.

(Deposition of Louis Woodson at page 67-68, emphasis added.)

It is clear that Woodson contractually agreed to indemnify Amoco thereby waiving any immunity to suit. Thus Woodson's negligence is an issue that should be decided by the jury.

IV.

ASSUMING, ARGUENDO, THAT ETHYL DOES APPLY THE AMOCO-WOODSON AGREEMENT SHOULD BE REFORMED TO SATISFY THE EXPRESS NEGLIGENCE TEST, THEREBY SATISFYING ETHYL AND REFLECTING THE TRUE INTENT OF THE PARTIES

Even if the Court holds that the Amoco-Woodson Agreement is subject to Ethyl and the "express negligence test," any failure of the contract to comply with Ethyl is a result of a mutual mistake of the parties, and thus Amoco would request that the Court invoke its equitable powers and grant reformation of the instrument so as to satisfy Ethyl and thereby express the true intent and agreement of the parties. In texas, it is well settled that "[i]f by mistake, an instrument as written fails to express the true intention or agreement of the parties, equity will grant reformation of the instrument so as to make it correctly express the agreement actually made." Brinker v. Wobaco Trust Ltd., 610 S.W.2d 160, 163 (Tex. Civ. App. --Texarkana 1980, writ ref'd n.r.e.). In proving true intent of the parties, parole evidence is admissible. Brinker at 164; Santos v. Mid-Continentnt Refrigerator Co., 471 S.W.2d 568, 569 (Tex. 1971). In the case at bar, the testimony of Woodson's president himself (supra at 5) unequivocally establishes that Woodson intended to indemnity and hold Amoco harmless from the consequences of Woodson's own negligence.

Thus if the indemnity language in the Amoco-Woodson contract does fail to satisfy Ethyl, it is due to a mutual mistake of the parties and therefore, the Court's equitable powers may be invoked to reform the contract to satisfy Ethyl and reflect the true intent of the parties. It is immaterial whether the mistake be one of fact or law.

McClung v. Lions, 430 S.W.2d 179 (Tex. 1968).

It is also clear that where an agreement fails to reflect the true intent of the parties due to ignorance or mistake as to the legal effect of the language selected by the parties, reformation to reflect that intent is proper:

> It is an established rule of decision in this state that appropriate equitable relief will be granted against a mutual mistake of law in reducing an agreement to writing. The parties knowing the terms of the agreement, but misconceiving the legal effect of said terms.

Moore v. City of Beaumont, 195 S.W.2d 968, 987 (Tex. Civ. App. --Beaumont 1946 aff'd, 201 S.W.2d 448 (Tex. 1947). See also Gilbert v. Smith, 49 S.W.2d 702, 703 (Texas. Comm'n App. 1932, holding approved); Brinker v. Wobaco Trust Ltd., 610 S.W>2d at 164.

In the case at bar, the unambiguous testimony of Louis Woodson himself unequivocally establishes that although the parties may have used language that fails to meet the express negligence test, their clear intent was for Amoco to be indemnified by Woodson for Woodson's negligence. Therefore, Amoco would request that the court utilize its equitable powers in reforming the Amoco-Woodson Agreement to satisfy Ethyl and reflect the true, clear and unequivocal intent of the parties.

V.

WOODSON ALSO AGREED TO INDEMNIFY AMOCO FROM LOSSES OCCURRING DUE TO WOODSON'S IMPROPER PERFORMANCE UNDER THE CONTRACT

In addition to agreeing to indemnify Amoco for Woodson's negligence, Woodson also agreed to indemnify Amoco from Woodson's "poor, improper or unworkmanlike performance of any of the work to be performed hereunder," as well as for losses caused "by reason of any other thing in connection with the performance of this contract:'

> [1] The negligence of the contractor [Woodson] or any of its subcontractors or the employees of either, or [2] from poor, improper or unworkmanlike performance of any of the work to be performed hereunder, or [3] by materials (except such as the company [Amoco] may have furnished) used in said work which are defective, or [4] by reason of any other thing in connection with the performance of this contract.

(Amoco-Woodson Agreement at page 6 (brackets and emphasis added), attached hereto as Exhibit "A"). Thus, Amoco also seeks indemnity for Woodson's poor, improper or unworkmanlike performance of the duties outlined in the Amoco-Woodson Agreement, or for loss incurred by reason of "any other thing" in connection with Woodson's performance of the contract. Such a claim is divorced from concepts of negligence and is thus not governed in any way by Ethyl, the express negligence test, or related negligence doctrines. Therefore, even if Amoco had no indemnity claim for Woodson's negligence, it would still have a valid indemnity claim for losses caused by Woodson's poor or improper performance of the work it agreed to undertake pursuant to the Amoco-Woodson contract.

Indemnmity claims for poor performance of contractual duties not involving negligence have beern upheld by Texas courts. In Lone Star Industries, Inc. v. Atchison,

Topeka, & Santa Fe R.R. Co., 666 S.W.2d 376 (Tex. App. --Beaumont 1984, writ ref'd n.r.e.) the court allowed indemnity for the indemnitor's breach of a construction contract wherein the indemnitee agreed to "keep a space of six feet from the nearest rail of any railroad track entirely clear of structures, materials and obstructions of every sort. . . . In case of a breach of these obligations, or any of them, the industry [indemnitee-contractor] assumes and agrees to indemnify the railway company against all liability for loss, damage, injury and death arising therefrom... ." Lone Star at 379. The jury found that the indemnitor did breach its agreement to keep the specified space clear of obstructions and the court held:

> Under the findings of the jury, the acts or omissions in the breach of the agreement by Lonestar created the condition under which Santa Fe was held liable and, by reason thereof, Santa Fe was entitled to full indemnity over and against Lonestar.

Lone Star at 379.[3] In Ealand v. Gulf, Colorado & Santa Fe R.R. Co., 411 S.W.2d 591 (Tex. Civ. App. --Beaumont 1967, no writ) the court interpreted a similar indemnity clause and noted:

---

[3] Lone Star was recently cited with approval by the Supreme Court of Texas in Payne & Keller, Inc. v. P.P.G. Industries, Inc., 1990 W.L. 82864 (Tex. 1990) (decision not yet released for publication): "The court of appeals in Lone Star held that the absence of a proximate cause finding as to Lone Star's acts did not absolve Lone Star from its liability for indemnity because Lone Star breached its express contractual duty to keep the tracks clear of obstructions, with the result that Santa Fe was sued under the FELA. Because an act or omission of Lone Star was found to have made the workplace unsafe, Lone Star was held to have breached its agreement, making the provisions of the indemnity agreement operative. [emphasis added]"

> A finding by the jury that Simpson's injuries resulted from the breach of such obligation on the part of Ealand-Wood Lumber Company is
>
> supported by the evidence would bring this case within the terms of paragraph 6 of the agreement and complete indemnity would result.

Ealand at 594.

Both these cases indicate that a breach of a work agreement, such as the Amoco-Woodson Agreement, can support an indemnity claim pursuant to the appropriate contractual language. Clearly the issue of whether Woodson improperly performed under the contract and/or engaged in unworkmanlike performance, as well as whether or not this conduct resulted in the Plaintiff's injuries, is a fact issue that must be decided by the jury and thus summary judgment is not proper.

VI.

PLAINTIFF'S COMPLAINT DOES NOT GOVERN AMOCO'S CROSS-ACTION AGAINST WOODSON

In Section 5.1 of its Motion, Woodson claims that Amoco cannot seek indemnity for damages caused by Woodson's negligence because "Amoco has not been sued for Woodson's alleged negligence." Cross-Defendant goes on to note that the Plaintiff's complaint does not allege that Woodson was negligent, and further that Plaintiff is barred by law from seeking recovery for the negligence of his employer Woodson.

Plaintiff has not sued Woodson, nor alleged that Woodson was negligent because - as Woodson itself notes in Section 5.1 of its Motion - the Plaintiff is barred from seeking recovery in negligence against Woodson because Woodson is his employer. Furthermore, this argument is fatally flawed in that the Cross-Action of Amoco is not governed or controlled by the pleading of the Plaintiff. Amoco's Cross-Action against Woodson is derivative of any action the Plaintiff has against Woodson and thus is not subject to the compensation bar. In addition, Woodson has contractually waived any immunity it has to a negligence or indemnity suit by Amoco.

VII.

VARELA DOES NOT BAR AMOCO'S CROSS-ACTION

In Section 5.2 of its Motion, the Plaintiff cites Varela v. American-Petrofina Co. of Texas, Inc., 658 S.W.2d 561 (Tex. 1983) and states that the issue of Woodson's negligence or that of a an employee cannot be submitted to the jury. The issue of Woodson's negligence certainly can be submitted to the jury where Woodson agreed to indemnify Amoco for its own [Woodson's} negligence thereby waiving its immunity to suit. The jury must be permitted to decide whether or not Woodson was indeed negligent in causing the Plaintiff's injuries. As Woodson also agreed to indemnify Amoco for Woodson's poor, improper or unworkmanlike performance under the contract, the jury must also decide whether or not Woodson properly adhered to the terms of the Agreement.

Even if Amoco could not sue Woodson for Woodson's negligence, Amoco would still be permitted to plead and present evidence of Woodson's negligence as well as get a jury instruction pursuant to the sole proximate cause

defense it has pled in Section VII of its Amended Answer. Gross v. Black & Decker, Inc., 695 F.2d 858, 861 (5th Cir. 1982), "Under Texas law . . . a Defendant . . . may protect itself through pleading, proof, and findings that the negligence of such person was the sole proximate cause of the event.").[4]

Furthermore, Woodson has contractually waived immunity from suit by Amoco and consequently pleading, proof, and jury issues regarding Woodson's negligence are proper. In addition, Amoco's breach of express and implied warranty claim is not subject to Varela. Varela dealt with negligence and comparative causation under Duncan, not breach of warranty or contractual claims.

VIII.

CONCLUSION

Woodson has contractually waived its immunity to third party suit by virtue of its agreement to indemnify Amoco for its own [Woodson's] negligence. Woodson

---

[4] See also Sappington v. Younger Trans., Inc., 758 S.W.2d 886, 868 (Tex. App. --Corpus Christi 1988, no writ) (Evidence of employer's negligence through co-employees could properly be considered in determining causation. Sole proximate cause be submitted to the jury as an instruction.); Agricultural Warehouse, Inc. v. Uvalle, 759 S.W.2d 691, 694 (Tex. App. --Dallas 1988, writ denied) ("Varela does not stand for the proposition that an employer's negligence cannot be considered in the third party negligence action for the purpose of reducing the third party's damages. ..The holding in Varela does not expressly exclude evidence at trial of an employer's negligencel"); Williams v. Union Carbide Corp., 734 S.W.2d 699, 702-03, (Tex. App. --Houston [1st Dist.] 1987, writ ref'd n.r.e.).

further agreed to indemnify Cross-Plaintiff Amoco for improper and unworkmanlike performance under the contract. As such, there are clearly genuine issues of fact concerning Woodson's negligence, and its performance of the duties it assumed under the Amoco-Woodson contract. These issues should be permitted to go to the jury.

WHEREFORE, PREMISES CONSIDERED, Cross-Plaintiff, Amoco Pipeline Company, respectfully requests that the summary judgment of Cross-Defendant, Woodson Construction Company, be denied and for such other and further relief, both general and special, at law or in equity, to which Amoco is justly entitled.

Respectfully submitted,

By: /s/ Edward J. Murphy

Edward J. Murphy
State Bar No. 14697500
Admissions No. 5174
ATTORNEY-IN-CHARGE FOR CROSS-PLAINTIFF AND DEFENDANT AMOCO PIPELINE COMPANY
2000 First Interstate Tower
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-6700

OF COUNSEL:

CLANN, BELL & MURPHY
A Professional Corporation
Gerald J. Kimmitt, II
State Bar No. 11427500
Admissions No. 8454

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Defendant and Cross-Plaintiff, Amoco Pipeline Company's Response to Cross-Defendant, Woodson's Motion for Summary Judgment has been sent certified mail, return receipt requested, or via hand delivery to all counsel of record, on this the 13th day of July, 1990.

/s/ Vicky J. Howell
Vicky J. Howell

JTB:vjh
G:\JTB\DD166.25

In addition to its rights set fo_____, Company reserves the right at any _____ to completion of Contractor's work hereunder to take over the balance of the work to be performed hereunder and complete same with in-plant labor force, by giving Contractor at least ten (10) days prior written notice to the effective date of take-over. In the event that Company exercises this option, Company agrees to pay Contractor an equitable percentage to be agreed upon by the parties, of the Contract Price related to the work completed. In case of such termination, Contractor shall turn over to Company all drawins, specifications, data sheets, and other matter that Contractor may have prepared for the Job and all materials, supplies, and equipment paid for by Company either directly or indirectly, and Company shall have the right to make use of said drawings, specifications, materials, supplies, and equipment for such purposes as Company may desire. Also, upon such termination Company shall accept Contractor's commitments under all unfulfilled purchase orders theretofore issued by Contractor in good faith in connection with the work. Contractor shall be obligated for all guarantees under the Contract applying to the portion of the work completed prior to the termination of Contractor's work.

Section IX. Guarantees and Inspection

The Contractor guarantees for a period of one year after final acceptance of the Job that all workmanship and/or materials which it or its subcontractors, if any, furnish under this Contract will be of the very best quality, first-class in every particular for the grade specified, free from objectionable defects, and will conform in all respects to the drawings and specifications, if any, applicable to the Job. All work and materials furnished by the Contractor under the terms hereof shall be subject to the approval of Company's inspectors, but such approval shall not relieve the Contractor of its

responsibility for improper, inferior or defective workmanship or materials. If any failure or failures to meet or to conform to the within guarantees are found within a period of one year commencing with the date of final acceptance of the Job, the Contractor will; (a) for a lump-sum Job or a unit price Job or the lump-sum or unit price portion of a Job, bear the entire costs of any repairs, alterations and replacements necessary to repair, alter, or, where necessary, to remove and replace defective workmanship and/or materials, and will; (b) for a cost-plus Job or for the cost-plus portion of a Job, bear the entire cost of all repairs, alterations and replacements required as a result of manifest carelessness or wilfulness or obvious disregard of specifications, drawings, ect. on the part of the Contractor; except, however, where in either case (a) or (b), the necessity for such was due to defective workmanship and/or materials furnished by Company.

Such repairs, alterations, and replacements shall not constitute a limitation on Contractor's liability for direct and/or consequential damages resulting from such defective workmanship and/or material and Contractor, in addition to making such repairs, alterations, and replacements, shall be fully responsible for any such direct and/or consequential damages in accordance with all applicable agreements and/or laws.

Section X. Liability and Insurance

The Contractor shall indemnify and save Company harmless from and against any and all losses, claims, demands, liabilities, suits or actions (including all reasonable expenses and attorney's fees) for injuries to or the death of any person or persons, including the employees of each party hereto and the employees of their subcontractors, or for loss of or damage to the property of any person or persons, including

the employees of each party hereto and the employees of their subcontractors, or for loss of or damage to the property of any person or persons, including the property of Company, caused by or resulting from the negligence of the Contractor or any of its subcontractors or the employees of either, or from poor, improper or unworkmanlike performance of any of the work to be performed hereunder, or by materials (except such as Company may have furnished) used in said work which are defective, or by reason of any other thing in connection with the performance of this Contract and the Contractor agrees to reimburse Company for all sums which Company may pay or be compelled to pay in settlement of any claim on account thereof, including any claim under the provisions of any worker's compensation law or other similar law, or under any plan for employees' benefits which Company may have or adopt, except that the Contractor assumes no liability for the sole negligent acts of Company, its agents, servants or employees.

IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL

Plaintiffs

VERSUS C. A. NO. H-87-4158

AMOCO PIPELINE COMPANY

Defendant

* *

DEPOSITION OF

LOUIS WOODSON

JULY 12, 1989 1:45 P. M.

AT OFFICES OF
DAVID BLANCHET, ESQ.
321 WEST MAIN, SUITE 2D
LAFAYETTE, LOUISIANA

NAT DOGUET & ASSOCIATES
P. O. BOX 3226
LAKE CHARLES, LOUISIANA 70602
(318) 433-5672 1-800-284-9006

EXHIBIT B

Woodson.

Q. What does that phrase that I read mean to you?

A. Yeah. But you didn't finish the whole thing. "Caused by or resulting from the negligence of the contractor or any of his subcontractors". See, I'll hold you harmless for that if it's my negligence. I can't answer you if you don't read the whole sentence. I mean you're asking me to tell you something that --

Q. No. What I'm asking you to tell me --

A. You're just trying to put words in my mouth. I don't know what this means until I read the whole sentence.

Q. You've just finished reading it.

A. But I can read, too, you know. I've had a little schooling myself, you know.

Q. That's fine.

A. So if you read the whole thing, then I can tell you what I mean. But I --

Q. What does it mean?

A. -- I'm not going to tell you -- I'm not going to answer you word by word because I don't know until you finish the whole thing.

Q. What does it mean to you?

A. It means that I am going to hold Amoco -- anybody -- Woodson would hold anybody lia -- will hold you harmless for any work that we do if it's our negligence, if we were negligent. That's what it says.

Q. To who? That's the phrase I was reading. Who would you --

A. To the company, which is Amoco.

Q. And this is Amoco?

A. That's right.

Q. For any injuries or damages or whatever?

A. Yes. If it's our fault.

Q. And I assume that you meant to live up to that obligation to hold Amoco harmless?

A. I always do. That's the way I built my business.

Q. And that's why you had that six million dollars worth of insurance?

A. Not necessarily.

Q. Well, why did you have six million dollars worth of insurance?

A. Because I wanted -- I don't know why we buy -- we buy -- because the type of work we do is hazardous work, going around lines, digging around lines, and going under lines and over, so -- and a lot of the companies require that and some of them require more than that.

CERTIFICATE

I, CATHERINE LEGER, Notary Public for the State of Louisiana, do hereby certify that the above and foregoing 85 pages of typewritten matter was taken by me and represents a true and correct copy of the proceedings had at the time and place hereinabove set forth on Page one (1) hereof;

IN WITNESS WHERETO, I have hereunto affixed my signature at Morse, Louisiana, on this 8th day of August, 1989.

/s/ Catherine H. Leger
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON and	§	
GWENDOLYN MARIE	§	
HAMILTON, Individually and	§	
as Next Friend of Minors,	§	
CLINTON HAMILTON and	§	
and AMBER HAMILTON, and	§	
CHESTER HAMILTON and	§	**C.A. NO.**
EVYELYN HAMILTON	§	**H-87-4158**
	§	
VS.	§	
	§	
AMOCO PIPELINE COMPANY	§	

VERIFICATION

STATE OF TEXAS	§	
	§	
COUNTY OF HARRIS	§	

BEFORE ME the undersigned authority, on this day personally appeared James T. Brown, who is personally known to me, and being by me duly sworn on his oath deposes and states:

1. My name is James T. Brown. I am over 18 years of age, of sound mind, and have never been convicted of a crime. I am an attorney for Amoco Pipeline Company in the above referenced cause and have reviewed the attached Response and Exhibits thereto in that capacity.

2. Exhibit "A" to the attached Response is a true and correct copy of pages 67 and 68 of the July 12, 1989 deposition of Louis Woodson, President of Woodson Construction Company.

3. Exhibit "B" is a true and correct copy of the indemnity provision contained in Section X on page 6 of the Amoco-Woodson Agreement.

4. The contract was made and kept by Amoco Pipeline Company in the course of its regularly conducted business activities. This contract was made at the time of its execution by persons with personal knowledge of the acts, conditions, and agreements contained therein.

Further affiant sayeth not.

/s/ James T. Brown
James T. Brown

SUBSCRIBED AND SWORN TO BEFORE ME this 13 day of July, 1990.

/s/ Vicky J. Davis
Notary Public in and for the
STATE OF TEXAS

My Commission Expires:

VICKY J. DAVIS
NOTARY PUBLIC,
STATE OF TEXAS
MY COMMISSION EXPIRES
JULY 11, 1993

APPENDIX P

United States District Court
Southern District of Texas
FILED
JAN 29 1991
Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

JOINT REQUEST FOR RULING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WOODSON CONSTRUCTION COMPANY, Third-Party Defendant, and AMOCO PIPELINE COMPANY, Defendant, and request that the Court provide a Memorandum Opinion on WOODSON CONSTRUCTION COMPANY's Motion for Summary Judgment, and as grounds for this Request would respectfully show as follows:

I.

1.1 This action arises out of a pipeline fire and explosion which occurred on September 9, 1987, in Kemah, Texas. Plaintiff ROBERT HAMILTON was at the time of the incident in question an employee of WOODSON

CONSTRUCTION COMPANY, acting within the course and scope of his employment. Plaintiff ROBERT HAMILTON subsequently filed suit against AMOCO PIPELINE COMPANY, alleging that he was severely injured during the incident and that AMOCO PIPELINE COMPANY was responsible in law for his injuries.

1.2 Subsequent to the foregoing, AMOCO PIPELINE COMPANY, with leave of Court, filed an action against WOODSON CONSTRUCTION COMPANY, based upon a contract between WOODSON and AMOCO, seeking indemnity. WOODSON has filed a responsive Answer to the claim of AMOCO PIPELINE COMPANY.

1.3 Thereafter, WOODSON CONSTRUCTION COMPANY filed a Motion for Summary Judgment. AMOCO PIPELINE COMPANY filed a Response to the Motion for Summary Judgment. On December 12, 1990, the Court denied WOODSON's Motion for Summary Judgment, but did not provide the parties with the basis for the denial.

1.4 The parties would show that, as represented to the Court during the Status Conference of January 14, 1991, clarification from the Court, and in particular the Court's guidance as to the reasons for the Court's ruling on the Motion for Summary Judgment, could greatly enhance the prospects of settlement or resolution of this case without the necessity of a full trial.

II.

2.1 A review of the Motion for Summary Judgment and AMOCO's Response in Opposition to the Motion, reveals that there are four grounds upon which the Court could have denied WOODSON's Motion for Summary Judgment:

1. The Court could be of the opinion that AMOCO is entitled to complete indemnity, pursuant to the terms of the indemnity contract between the parties, from WOODSON CONSTRUCTION COMPANY.

2. The Court could be of the opinion that AMOCO has a valid cause of action for indemnity, based upon percentage allocation of fault, from WOODSON CONSTRUCTION COMPANY.

3. The Court could be of the opinion that the contract between the parties is ambiguous and hence subject to clarification by way or oral testimony. Thus, there would be a fact issue which would need to be resolved by way of a finding of fact at trial. The Court, likewise might find the deposition testimony of Louis Woodson further confirms the intent of the parties on the issue of indemnity.

4. Finally, the Court could be of the opinion that AMOCO's claim for contribution and indemnity is not valid, but that on the other hand AMOCO, having filed a claim for its own expenses and costs incurred in responding to the incident which injured Mr. HAMILTON, is entitled to assert a claim against WOODSON for those costs and expenses, which total slightly in excess of $100,000.00.

5. In addition, the Court might have had an independent ground for its opinion, not listed previously, or felt a combination of several reasons justified denying WOODSON's Motion for Summary Judgment.

III.

The issues in question had been fully briefed by the parties and, for the Court's convenience, copies of the Motions and Briefs are attached. Neither party filed a

Motion for Reconsideration of the Court's December 12, 1990 Order and neither party is at this time requesting reconsideration of the Court's previous ruling, but simply a clarification of the reasons for said ruling.

IV.

In the light of the foregoing, the parties respectfully request that the Court provide them with guidance and specifically advise of the basis for the Court's ruling on the Motion for Summary Judgment.

WHEREFORE, PREMISES CONSIDERED, Defendant AMOCO PIPELINE COMPANY and Third-Party Defendant WOODSON CONSTRUCTION COMPANY respectfully request that the Court issue a Memorandum Opinion or similar document outlining the Court's reasons for its ruling on the Motion for Summary Judgment, and that the parties be given such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

CLANN, BELL & MURPHY

BY: /s/ Gerard J. Kimmitt
GERARD J. KIMMITT
State Bar No. 11427500
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
Telephone: 713-871-6700
Facsimile: 713-871-6767

ATTORNEYS FOR DEFENDANT, AMOCO PIPELINE COMPANY

NELSON & BINGHAM

BY: /s/ Bradley M. Bingham
BRADLEY M. BINGHAM
State Bar No. 02322400
1900 West Loop South
Suite 700
Houston, Texas 77027
Telephone: (713) 297-0700
Facsimile: (713) 297-0768

ATTORNEY IN CHARGE FOR CROSS-DEFENDANT, WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this the 29th day of January, 1991.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

\DOCS\20

APPENDIX Q

United States District Court
Southern District of Texas
FILED
SEP 28 1992
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

MOTION FOR ENTRY OF JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Amoco Pipeline Company, Cross-Plaintiff in the above-referenced matter and respectfully requests that this Court enter the attached Final Judgment and in support thereof respectfully show the Court as follows:

I.

The remaining parties to this litigation, Amoco Pipeline Company and Woodson Construction Company have resolved their differences with respect to the negligence of the parties. The parties have previously agreed to several stipulations which are on file with this Court. Said stipulations support the entry of the attached Judgment.

WHEREFORE, THE PREMISES CONSIDERED, Cross-Plaintiff Amoco Pipeline Company respectfully requests this Court enter the attached Final Judgment and for any other relief, both general and special, at law or in equity, to which Cross-Plaintiff may show itself justly entitled.

Respectfully submitted,

BELL & MURPHY

/s/ Gerard J. Kimmitt, II
Edward J. Murphy
TBA No. 14697500
Gerard J. Kimmitt, II
TBA No. 11427500
1300 Post Oak Blvd., Suite 2000
Houston, TX 77056-3095
(713) 871-6700 Telephone
(713) 871-6767 Facsimile

ATTORNEYS FOR CROSS PLAINTIFF AMOCO PIPELINE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **Motion for Entry of Judgment** was mailed, certified, return receipt requested, to:

Bradley M. Bingham
Bingham & Mann
1221 Lamar, Suite 1330
Houston, TX 77010

Gary L. Wickert
Hughes, Watters & Askanase
1415 Louisiana, Suite 3700
Houston, TX 77002

on this 28 day of September, 1992.

/s/ Renee Schouest
Renee Schouest

155-25.MEJ

APPENDIX R

United States District Court
Southern District of Texas
FILED
SEP 28 1992
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

MOTION FOR JUDGMENT AND REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WOODSON CONSTRUCTION COMPANY, Cross-Defendant, and moves this Court to enter judgment for Cross-Defendant and against Cross-Plaintiff, AMOCO PIPELINE COMPANY, and to make Findings of Fact and Conclusions of Law consistent with that Judgment, and for same would respectfully show as follows:

I.

FINDINGS OF FACT

AMOCO PIPELINE COMPANY, Cross-Plaintiff, and WOODSON CONSTRUCTION COMPANY, Cross-

Defendant, have agreed and stipulated to facts which have been previously submitted to the Court. WOODSON CONSTRUCTION COMPANY has additionally submitted proposed Findings of Fact as Exhibit "A" to this motion, based upon the Stipulations and pleading in this cause. Cross-Defendant would request this Court to make these Findings of Fact, in addition to any further facts that this Court deems necessary to support the Judgment.

II.

CONCLUSIONS OF LAW

Cross-Defendant asks this court to enter the following Conclusions of Law, in addition to any further Conclusions of Law that this Court deems necessary to support Judgment for Cross- Defendant:

1. The Court has jurisdiction of the parties and the subject matter in controversy.

2. WOODSON CONSTRUCTION COMPANY, is not liable under the contract provision, made subject of this suit, for its proportional share of Plaintiffs', Robert Hamilton's, Raywood Frederick's and Arthur Thomas' damages paid in settlement by AMOCO PIPELINE COMPANY.

3. WOODSON CONSTRUCTION COMPANY is not liable to AMOCO PIPELINE COMPANY under the common law or by statute.

4. The contract provision, made subject of this suit, does not provide for contribution between AMOCO PIPELINE COMPANY and WOODSON CONSTRUCTION COMPANY, as the contract is not a contract for contribution.

5. The contract provision, made subject of this suit, is ambiguous and unenforceable against WOODSON CONSTRUCTION COMPANY.

6. The contract provision, made subject of this suit, does not meet the "express negligence rule," in that it does not provide for indemnity for AMOCO PIPELINE COMPANY'S sole or concurrent negligence or for comparative negligence between two tortfeasors.

7. Cross-Defendant, WOODSON CONSTRUCTION COMPANY, is entitled to entry of Judgment herein directing the Cross-Plaintiff, AMOCO PIPELINE COMPANY, take nothing by its action and to pay Cross-Defendant, WOODSON CONSTRUCTION COMPANY's, costs in this action.

In support for the above Conclusions of Law, Cross-Defendant would show this Court the following:

A. INDEMNITY

Amoco has pled for contribution or indemnity for that portion of Woodson's negligence that was a proximate cause of the accident involving Robert Hamilton, Raywood Frederick and Arthur Thomas. In other words, Amoco is asking Woodson to pay that part of the damages which it incurred in settlement of this action. It is Woodson's position that the contract sued under was an indemnity provision is ambiguous and does not satisfy the express negligence rule.

Indemnity and contribution are similar but distinguishable concepts. Hardy v. Gulf Oil Corp., 949 F.2d 826 (5th Cir. 1992). The two concepts "are similar in that each designates a legal theory under which one may recover

money, paid by him to an injured plaintiff, from another who is also legally liable for the plaintiff's injuries." W. R. Grace v. Scotch Corp., Inc., 753 S.W.2d 743, 747, n.3 (Tex. App. --Austin 1988, writ denied). This similarity between "indemnity" and "contribution" has led many court to use the terms as synonyms, which has caused a great deal of confusion in interpreting their opinion. Id.

One primary difference between the two theories is the amount that is recoverable under one theory as compared to the other. Id. An indemnity agreement is designed to allow one tortfeasor to shift all the loss onto another tortfeasor "provided the latter should appropriately answer for the entirety of the loss." **Hardy v. Gulf Oil Corp.**, 949 F.2d 826. Therefore, "indemnity" contemplates "the payment of all of plaintiff's damages one tortfeasor to another tortfeasor who has paid it to the plaintiff." **W. R. Grace v. Scotch Corp., Inc.**, 753 S.W>2d at 747, n. 3 (quoting **General Motors Corp. v. Simmons**, 558 S.W.2d 855, 859 (Tex. 1977). For example, if there is a valid indemnity agreement providing for concurrent negligence, which meets the "express negligence rule," the indemnitor is liable not only for damages caused by its own negligence but for that portion of the incident attributable to the negligence of the indemnitee.

By comparison, "contribution" requires that each tortfeasor pay its "proportionate share of the plaintiff's damages to any other tortfeasor who has paid **more than his proportionate share." Id.** In other words, each tortfeasor pays for his own share of negligent conduct. One party does not assume the burden for paying for both parties as does an indemnitor under a valid indemnity contract.

When the language of the contract in question is examined under this criteria, it is clear that the provision is

one for indemnity and not contribution. Furthermore, language to the effect that "The Contractor **shall indemnify** and **save Company harmless....**" are words of indemnity, not contribution. It is clear, therefore, that the parties agreed to one thing--indemnity-- and Amoco is asking for something else--contribution.

The "express negligence" doctrine provides that in order for one party to agree to assume all the loss in the event another party is partially or totally at fault, the contract must expressly state, in clear and unequivocal language, that intention. This intent must be specifically stated within the four corners of the instrument. **Aerospatiale Helicopter v. Universal Health Services**, 778 S.W.2d 492 (Tex. App.--Dallas 1989, writ denied). Thus, any contract wherein an indemnitee seeks indemnity for the consequences of its own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must meet the express negligence test. Id. at 501.

The contract between Amoco and Woodson does not meet the express negligence test because it does not provide for any partial or comparative indemnification for Amoco's negligence, must less Amoco's sole negligence. As such, it is ambiguous and unenforceable.

Amoco argued in its Response to the Motion for Summary Judgment of Cross-Defendant Woodson Construction Company that the express negligence test does not apply in this situation because "Amoco is asserting an indemnity claim for the consequences of the indemnitor's [Woodson's] negligence, not the indemnitee's negligence." This statement turns the concept of indemnity upside down. As shown above, under an indemnity agreement, the indemnitee seeks to be indemnified for the consequences of its own negligence and thus, shift the burden of paying the

plaintiff to the indemnitor. Here, Amoco is not trying to shift the burden of paying Plaintiffs for Amoco's own negligence to Woodson. Rather, Amoco is trying to make Woodson pay for Woodson's share of the joint negligence that legally caused Plaintiffs' injuries.

The indemnitor's (Woodson's) negligence is not at issue in a question of true indemnity. If the indemnity provision meets the express negligence test, the indemnitor ends up paying all of the Plaintiff's damages. It is for this very reason that Texas courts have not addressed or discussed the question of the indemnitor's negligence in this context--it is irrelevant. The express negligence test only determines whether the indemnity provision, in question, expressly and unequivocally provides that the indemnitor must assume the burden of paying the plaintiff for the indemnitee's negligence, whether partial or sole.

Thus, the contract in question is an "indemnity" contract and as such, is not enforceable.

B. CONTRIBUTION

As discussed above, the contract in question is one of indemnity not contribution. There is no language in the contract evidencing an intent that Woodson is to pay its proportionate share of the Plaintiffs' damages in the event both Amoco and Woodson were negligent. Absent a contractual agreement to pay a proportionate share of common liability, Woodson is immune from suit for contribution because Robert Hamilton, Raywood Frederick and Arthur Thomas were employees of Woodson and all received worker's compensation benefits. **See** Tex. Rev. Civ. Stat. Ann., Art. 3806, et seq.; **Monsanto Company v. Owens-Corning Fiberglass Corp.**, 764 S.W.2d 293 (Tex. App.--Houston [1st Dist.] 1988, no writ).

Moreover, Amoco has no common law or statutory right to contribution. A defendant who settles a plaintiff's entire claim, cannot seek contribution from an alleged joint tort-feasor who did not participate in the settlement. **Beech Aircraft Corporation v. Jenkins**, 739 S.W.2d 19 (Tex. 1987). Rather, "[t]he essential prerequisites for a contribution claim are a judgment finding the party seeking contribution to be a joint tortfeasor and the payment by such party of a disproportionate share of the common liability. An agreed judgment incorporating a settlement does not provide a basis for subsequent contribution claims." Id. at 21. This is because a settling tortfeasor cannot settle more than its proportionate share. Id. at 22.

As shown above, the contract executed between Amoco and Woodson is one for indemnity, not contribution. This indemnity contract, however, is ambiguous and fails to meet the express negligence test because it does not provide that Woodson is liable for concurrent or for comparative negligence between the contracting parties and, in fact expressly provides that Woodson is not liable for Amoco's sole negligence between the contracting parties and, in fact expressly provides that Woodson is not liable for Amoco's sole negligence. Accordingly, the contract does not shift the burden of paying all or part of Plaintiffs' damages from Amoco to Woodson. Therefore, Woodson is not liable for its proportionate share of the Plaintiffs' damages paid in settlement by Amoco.

WHEREFORE, PREMISES CONSIDERED, Cross-Defendant, WOODSON CONSTRUCTION COMPANY, respectfully requests that this Court enter Judgment for Cross-Defendant, and make such Findings of Fact and Conclusions of Law in support of that Judgment as are appropriate.

Respectfully submitted,

BINGHAM & MANN

BY: /s/ Bradley M. Bingham

BRADLEY M. BINGHAM
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ATTORNEY FOR DEFENDANT,
WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to all counsel of record in this cause by Certified Mail and that the original of the same has been duly filed with the Clerk of the Court on this the 28 day of September, 1992.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come before the Court on a Stipulation of Facts mutually submitted by the parties, and after hearing the allegations and proofs of the parties, and after considering the arguments and briefs of counsel, and being fully advised herein, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Robert Hamilton, Raywood Frederick, and Arthur Thomas were injured on or about September 9, 1987, on a pipeline owned by Amoco Pipeline Company, on Amoco Pipeline Company's right-of-way near Kemah, Galveston County, Texas.

2. Robert Hamilton, Raywood Frederick, and Arthur Thomas were employees of Woodson Construction Company at the time of their injuries.

3. At the time of Robert Hamilton's, Raywood Frederick's and Arthur Thomas' injuries, Woodson

Construction Company was engaged in installing Amoco's pipeline pursuant to the terms of a contract with Amoco Pipeline Company.

4. The contract between Woodson Construction Company and Amoco Pipeline Company contained the following provision:

> The Contractor [Woodson] shall indemnity and save Company [Amoco] harmless from and against any and all losses, claims, demands, liabilities, suits or actions (including all reasonable expenses and attorney's fees) for injuries to or the death of any person or persons, including the employees of each party hereto and the employees of their subcontractors, ... caused by or resulting from the negligence of the Contractor or any of its subcontractors or the employees of either, or from poor, improper or unworkmanlike performance of any of the work to be performed hereunder, or by materials (except such as Company may have furnished) used in said work which are defective, or by reason of any other thing in connection with the performance of this Contract and the Contractor agrees to reimburse Company for all sums which Company may pay or be compelled to pay in settlement of any claim on account thereof, including any claim under the provisions of any worker's compensation law or other similar law, or under any plan for employees' benefits which Company may have or adopt, except that the Contractor assumes no liability for the sole negligent acts of Company, its agents, servants or employees.

5. The agreement between Woodson Construction Company and Amoco Pipeline Company was executed prior to Robert Hamilton's, Raywood Frederick's and Arthur Thomas' injuries.

6. Woodson Construction Company was a subscriber of the Worker's Compensation Act.

7. Robert Hamilton, Raywood Frederick and Arthur Thomas were paid worker's compensation benefits by Woodson Construction Company's Worker's Compensation carrier under Woodson's subscriber status.

8. Robert Hamilton, Raywood and Arthur Thomas sued Amoco Pipeline Company alleging that their injuries were the legal result of negligence on the part of Amoco Pipeline Company.

9. Robert Hamilton, Raywood Frederick and Arthur Thomas did not and could not sue Woodson Construction Company.

10. Amoco Pipeline Company entered into a settlement agreement with Robert Hamilton, Raywood Frederick and Arthur Thomas wherein Amoco Pipeline Company incurred damages by virtue of the settlement in the amount of $6,025,000.00.

11. Upon payment of the settlement amount to Robert Hamilton, Raywood Frederick and Arthur Thomas, Amoco Pipeline Company secured a full and complete release from them.

12. The settlement agreement executed between Amoco Pipeline Company and Robert Hamilton, Raywood Frederick and Arthur Thomas was reasonable and prudent under the circumstances.

13. Amoco Pipeline Company has filed an action against Woodson Construction Company, in Civil Action No. H-87-4158, originally styled Robert Lee Hamilton, et al vs. Amoco Pipeline Company, in the United States District Court for the Southern District of Texas, Houston Division, seeking contractual contribution under the contract language quoted above in Finding Number 4 for all or portions of the amounts paid in settlement to Robert Hamilton, Raywood Frederick and Arthur Thomas, as well as costs and attorney's fees.

14. Robert Hamilton's, Raywood Frederick's and Arthur Thomas' injuries were proximately caused by the joint negligence of Amoco Pipeline Company and Woodson Construction Company according to the following percentages:

Amoco Pipeline Company : 50%
Woodson Construction Company: 50%

15. The joint negligence of Amoco Pipeline Company and Woodson Construction Company was the legal cause of Robert Hamilton's, Raywood Frederick's and Arthur Thomas' damages.

From the foregoing facts, the Court concludes"

CONCLUSION OF LAW

1. The court has jurisdiction of the parties and the subject matter in controversy.

2. WOODSON CONSTRUCTION COMPANY, is not liable under the contract provision, made subject of this suit, for its proportional share of Plaintiffs', Robert Hamilton's, Raywood Frederick's and Arthur Thomas' damages paid in settlement by AMOCO PIPELINE COMPANY.

3. WOODSON CONSTRUCTION COMPANY is not liable to AMOCO PIPELINE COMPANY under the common law or by statute.

4. The contract provision, made subject of this suit, does not provide for contribution between AMOCO PIPELINE COMPANY and WOODSON CONSTRUCTION COMPANY, as the contract is not a contract for contribution.

5. The contract provision, made subject of this suit, is ambiguous and unenforceable against WOODSON CONSTRUCTION COMPANY.

6. The contract provision, made subject of this suit, does not meet the "express negligence rule," in that it does not provide for indemnity for AMOCO PIPELINE COMPANY'S sole or concurrent negligence or for comparative negligence between two tortfeasors.

7. Cross-Defendant, WOODSON CONSTRUCTION COMPANY, is entitled to entry of Judgment herein directing the Cross-Plaintiff, AMOCO PIPELINE COMPANY, take nothing by its action and to pay Cross-Defendant, WOODSON CONSTRUCTION COMPANY's, costs in this action.

The foregoing conclusions of law insofar as they may be construed Findings of Fact are so found by this Court to be true in all respects.

SIGNED this the _____ day of _____, 1992.

_____

JUDGE PRESIDING

APPROVED:

BINGHAM & MANN

BY: _____

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ATTORNEYS FOR DEFENDANT,
WOODSON CONSTRUCTION COMPANY

APPENDIX S

United States District Court
Southern District of Texas
FILED
OCT 26 1992
Michael N. Milby, Clerk

IN THE UNTIED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-87-4158
AMOCO PIPELINE COMPANY, Defendant.	§	

DEFENDANT AMOCO'S MOTION FOR NEW TRIAL
OR TO ALTER OR AMEND JUDGMENT

TO THE HONORABLE JUDGE OF THIS COURT,

COMES NOW the Defendant and Third-Party Plaintiff Amoco Pipeline Company, and, pursuant to Rule 59, Fed. R. Civ. P., moves this Court for a new trial or to alter or amend the judgment contained in this Court's Findings of Fact and Conclusions of Law entered on October 14, 1992, for the following reasons:

1. Amoco settled a personal injury claim brought by three of Woodson's employees, including Hamilton. This Court had previously ruled on two prior occasions that if

Woodson Construction Company was negligent, and if that negligence was a proximate cause of the injuries to Hamilton and others, Amoco could recover from Woodson that portion of the settlement amount equal to Woodson's negligence. That decision was also discussed and confirmed at several Pre Trial Conferences. Attached as Exhibit "A" to this motion is a copy of the Court's prior ruling.

2. In reliance on those rulings, Amoco and Woodson entered into various stipulations, including the stipulation that Amoco had been negligent and that its negligence was the 50% cause of the injuries to Hamilton and others. Further, and also in reliance upon this Court's prior rulings, Amoco dismissed a breach of contract suit against Woodson.

3. This Court's Findings and Conclusions of October 14 order that Amoco take nothing. That conclusion and judgment are diametrically opposed to this Court's prior ruling on the same issue.

4. This Court's prior ruling was correct, and should be reflected in its final Findings of Fact and Conclusions of Law.

5. Alternatively, should this Court be inclined to reconsider its prior ruling, Amoco would ask this Courtr to provide notice that it is entertaining such a reconsideration, and Amoco would request the opportunity to brief the issue.

WHEREFORE, Amoco respectfully asks this Court to withdraw its Findings of Fact and Conclusions of Law entered on October 14, 1992, and to either grant a new trial or amend its findings and conclusions to direct that Amoco recover 50% of its settlement funds from Woodson, consistent with this Court's prior rulings.

RESPECTFULLY SUBMITTED this 26th day of October, 1992.

BELL & MURPHY

/s/ illegible

Edward J. Murphy
TBA No. 14697500
Gerard J. Kimmitt, II
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Houston, TX 77056-3095
(713) 871-6700 Telephone
(713) 871-6767 Facsimile

ATTORNEYS FOR DEFENDANT AND THIRD PARTY PLAINTIFF AMOCO PIPELINE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **Defendant Amoco's Motion for New Trial or to Alter or Amend Judgment** was mailed, certified, return receipt requested, to:

Bradley M. Bingham
Bingham & Mann
1221 Lamar, Suite 1330
Houston, TX 77010

Gary L. Wickert
Hughes, Watters & Askanase
1415 Louisiana, Suite 3700
Houston, TX 77002

on this 26 day of October, 1992.

/s/ Renee Schouest
Renee Schouest

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 10 1991
Jesse E. Clark, Clerk
By Deputy: /s illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL.,	§	
Plaintiffs,	§	
	§	CIVIL ACTION
V.	§	H-87-4158
	§	
AMOCO PIPELINE COMPANY,	§	
Defendant.	§	

ORDER

Pending before the Court are the Joint Request for Ruling (Document #133) and the Joint Motion to Pass Trial Setting (Document #146) filed by third-party defendant Woodson Construction Company ("Woodson") and defendant Amoco Pipeline Company ("Amoco"). Additionally pending is the Joint Motion for Judgment filed by Amoco and plaintiffs. This Court has considered the motions and the applicable law and determines that the joint request for ruling should be granted, that ruling upon the joint motion to pass trial setting should be withheld, and that the joint motion for judgment should be granted.

EXHIBIT "A"

In their joint request for ruling, Woodson and Amoco ask this Court to provide clarification of its prior ruling denying Woodson's motion for summary judgment (Document #129) in order to "enhance the prospects of settlement or resolution of [the] case without the necessity of full trial." Document #133, p.2. Based upon this representation, the Court determines that the motion should be granted. Therefore, this Court advises the parties that the material question of fact which this Court previously determined prevented the grant of judgment as a matter of law is: What percentage, if any, of the injuries suffered by plaintiff Robert Lee Hamilton ("Hamilton") were causes by the negligence of Woodson.

Additionally, this Court determines that ruling upon the joint motion to pass should be withheld. Counsel should appear for Docket Call on September 30, 1991, at 10:00 a.m. as previously order (Document #145) at which time counsel should be prepared to advise the status of this case.

Finally, through their joint motion for judgment, Amoco and plaintiffs as this Court to enter a take-nothing judgment with regard to the claims asserted by plaintiffs against Amoco in accordance with the settlement reached between those parties. This Court determines that the motion should be granted. Based upon the foregoing, it is

ORDERED that Woodson and Amoco's Joint Request for Ruling (Document #133) is GRANTED. It is further ORDERED that ruling upon Woodson and Amoco's Joint Motion to Pass Trial Setting (Document #146) is WITHHELD until September 30, 1991. It is additionally ORDERED that Amoco and Plaintiffs' Joint Motion for Judgment (Document #134) is GRANTED. Plaintiffs' shall TAKE NOTHING with regard to their claims against Amoco.

SIGNED at Houston, Texas, on this the 27 day of Setpember, 1991.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX T

United States District Court
Southern District of Texas
FILED
NOV 03 1992
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§
ET AL	§
	§ CIVIL ACTION NO.
VS.	§ H-87-4158
	§ JURY
AMOCO PIPELINE COMPANY	§ FOR

RESPONSE TO DEFENDANT AMOCO'S MOTION FOR NEW TRIAL OR TO ALTER OR AMEND JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WOODSON CONSTRUCTION COMPANY, Third-Party Defendant in the above styled and entitled cause, and responds to Third-Party Plaintiff and Defendant Amoco Pipeline Company's Motion for New Trial or to Alter or Amend Judgment, and would show the Court the following:

I.

Amoco has asked this Court to order a new trial or to alter or amend the judgment entered on October 14, 1992, on the basis that such judgment was inconsistent with pre-trial

orders. Amoco contends that this Court previously ruled that if Woodson was negligent and such negligence was the proximate cause of the injuries to Hamilton and others, then Woodson would be liable to Amoco for that portion of the settlement amount that was equal to Woodson's negligence.

Amoco has misconstrued this Court's prior rulings. In its Order, entered September 30, 1991, and attached as Exhibit "A" to Amoco's Motion for New Trial or to Alter or Amend Judgment, this Court advised the parties that there was a material fact question precluding judgment as a matter of law, to wit: "What percentage, if any, of the injuries suffered by Plaintiff, Robert Lee Hamilton were caused by the negligence of Woodson." Therefore, contrary to Amoco's contention, this Court did not hold, in this Order or at any other time, that once Woodson was assigned a percentage of negligence for the underlying injuries, Amoco would be entitled to damages from Woodson in proportion to that amount of negligence. Rather, this Court had only previously determined that there was perhaps a material fact question precluding summary judgment.

II.

In the alternative, Amoco has requested that it be allowed to brief the issues in this case should this Court be inclined to reconsider its prior ruling. In its Motion for Judgment, Woodson fully briefed the issue and showed this Court that Amoco was not entitled to contribution or indemnity for Woodson's percentage of negligence. Likewise, Amoco should have briefed and asserted its position in its Motion for Judgment, rather than merely ask that judgment be entered in its favor. In any event, and as the Court is fully aware, these issues have been fully briefed by the parties in connection with the Motion for Summary Judgment on this question. Thus, even though Amoco failed

to brief the issue in connection with a Motion for Judgment, it has done so elsewhere in connection with the proceedings in this case.

WHEREFORE, PREMISES CONSIDERED, Third-Party Dedendant, WOODSON CONSTRUCTION COMPANY, respectfully asks that this Court deny Defendant Amoco's Motion for New Trial or to Alter or Amend Judgment, and grant Woodson such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

BINGHAM & MANN

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ATTORNEYS FOR DEFENDANT,
WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this the 2d day of November, 1992.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

APPENDIX U

United States District Court
Southern District of Texas
FILED
(Date - illegible)
Michael N. Milby, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

SUPPLEMENTAL RESPONSE TO DEFENDANT AMOCO'S MOTION FOR NEW TRIAL OR TO ALTER OR AMEND JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WOODSON CONSTRUCTION COMPANY, Third-Party Defendant in the above styled and entitled cause, and supplementally responds to Third-Party Plaintiff and Defendant Amoco Pipeline Company's Motion for New Trial or to Alter or Amend Judgment, and would show the Court the following:

I.

Amoco contends that this Court made prior rulings to the effect that Woodson would be liable for the portion of the

settlement amount that was equal to the percentage of Woodson's negligence if it could be shown that Woodson was negligent and that such negligence was a proximate cause of the injuries to Hamilton and others. Contrary to Amoco's position, however, this Court did not hold that Woodson would be liable if and when a percentage of Woodson's negligence was established. Rather, this Court, in an order entered on September 20, 1992, and attached as evidence by Amoco as Exhibit "A" to its Motion for New trial or to Alter or Amend Judgment, advised the parties that there was a material fact issue precluding judgment as a matter of law, to wit: "What percentage, if any, of the injuries suffered by plaintiff Robert Lee Hamilton were caused by the negligence or Woodson."

II.

The amount of Woodson's negligence was at most a fact question that had to be determined prior to the disposition of this action because an argument could be made that, under the contract, if Woodson was 100% at fault for the underlying injuries, Amoco was entitled to some recovery. It is apparent that the Court was concerned about this possibility in issuing its memorandum opinion of September 20, 1992.

The negligence of Woodson as compared to the negligence of Amoco having now been established, this potential fact issue is no longer an issue in this case. The Stipulations make it clear that both parties are equally responsible for the incident in question, and thus it is quite clear under the terms of the contract, as the Court concluded in its Judgment, that Amoco is entitled to no recovery whatsoever from Woodson.

In short, until the question of whether Woodson was 100% at fault was resolved, there indeed was the possibility of a fact issue; now that the question has been resolved, there is no fact question and Woodson is entitled to Judgment in its favor.

WHEREFORE, PREMISES CONSIDERED, Third-Party Defendant, WOODSON CONSTRUCTION COMPANY, respectfully asks that this Court deny Defendant Amoco's Motion for New Trial or to Alter or Amend Judgment, and grant Woodson such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT,
WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this the 23d day of November, 1992.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

APPENDIX V

United States District Court
Southern District of Texas
FILED
NOV 24 1992
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

MOTION TO CORRECT CLERICAL MISTAKE IN JUDGMENT UNDER RULE 60(a)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Third-party Defendant, WOODSON CONSTRUCTION COMPANY, and pursuant to the provisions of Rule 60(a), Federal Rules of Civil Procedure, Moves the Court to correct a clerical mistake in the Judgment signed by this Court on October 9, 1992, and entered on October 14, 1992, and as grounds for this Motion would respectfully show as follows:

I.

On October 9, 1992, this Court signed Findings of Fact and Conclusions of Law, and Ordered that Judgment be entered in favor of Woodson to the effect that Amoco take

nothing from Woodson. This was entered by the clerk for the United States District Court, Southern District of Texas, on October 14, 1992.

II.

Third-party Defendant Woodson would show that there is a clerical matter which needs to be corrected in the Judgment. As the Court will note from a review of the Stipulations which were filed by the parties in this action, the issues made the basis of the Stipulations involved not just Robert Hamilton but as well two other individuals who were allegedly injured as a consequence of the incident made the basis of the original suit, to-wit: Raywood Frederick and Arthur Thomas. Further, the $6,025,000.00 figure referenced in the Stipulation and embodied in the Court's Findings of Fact represented payment to or on behalf of not only Mr. Hamilton, but as well Messrs. Frederick and Thomas. It was the intent of the parties, then, to resolve by way of the Stipulations and the Court's Judgment not only Amoco's claim based upon settlement with Mr. Hamilton, but as well its claim based upon settlement with Messrs. Frederick and Thomas.

II.

The foregoing reveals that the Court's Judgment should be clarified, then, to specify that in addition to Hamilton filing an action against Amoco, Messrs. Frederick and Thomas did so, as well, elsewhere. The Judgment should be further clarified to specify that Amoco, Hamilton, Frederick and Thomas executed a settlement agreement pursuant to which Amoco paid Hamilton, Frederick and Thomas $6,025,000.00.

III.

The conclusions of law entered by the Court should also be modified, to correct this matter, to reflect that, under conclusion No. 6, Amoco is not entitled to comparative indemnity for 50% of the amount paid to Hamilton, Frederick and Thomas, because the contract does not contain a provision for contractual comparative indemnity; to reflect under conclusion No. 8 that Amoco and Woodson are joint tortfeasors because both parties have stipulated that Hamilton's, Frederick's, and Thomas' injuries were caused 50% by Amoco's negligence and 50% by Woodson's negligence; and to reflect under conclusion No. 9 that since Amoco has settled with Hamilton, Frederick and Thomas, Amoco is not entitled to any contribution from Woodson for the settlement amount paid to Hamilton, Frederick and Thomas.

IV.

These matters were encompassed by the pleading which Amoco had filed against Woodson, and therefore were properly before this Court. Further, and by virtue of the fact that they have been addressed in the Stipulations and the Motions for Entry of Judgment, they have been tried by consent. Thus, and pursuant to the provisions of Rule 60, Federal Rules of Civil Procedure, the Court is respectfully requested to correct this clerical mistake arising from the oversight or omission in preparation of the Final Judgment.

WHEREFORE, PREMISES CONSIDERED, Third-Party Defendant, WOODSON CONSTRUCTION COMPANY, respectfully requests that this Motion be granted and that the Court correct its Judgment to reflect the

matters set forth above. Woodson further prays for such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

BINGHAM & MANN

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ATTORNEYS FOR DEFENDANT,
WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this the 23d day of November, 1992.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

APPENDIX W

United States District Court
Southern District of Texas
FILED
DEC 04 1992
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

DEFENDANT WOODSON CONSTRUCTION COMPANY'S BRIEF IN SUPPORT OF JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WOODSON CONSTRUCTION COMPANY ["Woodson"], Third-party Defendant, and files its Brief in support of the Court's Judgment.

I.

EFFECT OF COURT RULING OF SEPTEMBER 27, 1991

1.1 The Court in its prior Order ruled that there was a fact issue which precluded the granting of the summary judgment. Despite Amoco's argument to the

contrary, this is not a holding that Amoco will be entitled to recover a percentage of its damages from Woodson.

1.2 The Court's prior ruling is supported by the argument that Amoco might be entitled to recover damages from Woodson if Woodson were 100% at fault. Thus, until this issue was resolved, the Court was unable to enter a judgment. Now that it has been determined that Woodson was not 100% at fault for the incident in question, the Court is in a position to conclude, as it did, that Amoco is not entitled to recover in this action.

II.

INDEMNITY

2.1 Indemnity is accomplished only through a contract which meets the "express negligence" rule. Here, Amoco is not entitled to indemnity and at the November 30, 1992, hearing Amoco's counsel admitted as much. As the contract between the parties does not meet the "express negligence" rule, Amoco is not entitled to indemnity.

III.

CONTRIBUTION

3.1 At the hearing on November 30, 1992, Amoco asserted that it was not seeking indemnity for its own negligence, but rather was seeking contribution for that portion of the incident attributable to Woodson's negligence. Thus, Amoco apparently is seeking to recover 50% of the damages which it incurred in settling with the three claimants, Hamilton, Frederick and Thomas.

3.2 Amoco is not entitled to common law contribution, as such a claim is barred by the Supreme Court's holding in Beach Aircraft Corporation v. Jenkins, 739 S.W. 2d 19 (Tex. 1987). Thus, if Amoco is entitled to contribution, it must be based upon the contract.

3.3 Woodson has briefed this issue in its Motion for Judgment. The contract between the Parites is one for "indemnity", as it speaks in terms of "indemnity", and makes no mention of "contribution." The language upon which Amoco is basing its claim begins with the following: "The contractor shall indemnify and save company harmless...." These are words of indemnity, not contribution. There is no evidence in the contract to suggest that the parties entered into any agreement for contractual contribution. Thus, not only does the contract not meet the "express negligence" test for indemnity, it meets no test whatsoever for contribution -- it is silent on this issue.

3.4 Absent a contractual agreement to pay a proportionate share of common liability, Woodson is immune from suit for contribution because Hamilton, Frederick and Thomas were employees of Woodson and all received workers compensation benefits. See Tex. Rev. Civ. Stt. An., Art. 3806, et seq.; Monsanto Co. v. Owens-Corning Fiberglass Corp. 764 S.W. 2d 293 (Tex. App. -Houston[1st dist.] 1988, no writ). Thus, Amoco's claim is barred.

IV.

MOTION TO CORRECT CLERICAL MISTAKE IN JUDGMENT

The Court's records will reflect, finally, that Woodson has filed a Motion to Correct Clerical Mistake in Judgment, pursuant to the provisions of Rule 60(a), Federal

Rules of Civil Procedure, asking this Court to correct a clerical matter in the Judgment to reflect that Amoco's claim is based upon a settlement with not only Mr. Hamilton, but as well Raywood Frederick and Arthur Thomas. These parties are named in the Stipulations filed with the Court; it is clear from the Stipulation that the $6,025,000.00 figure represents all three claimants; Amoco's third-party action against Woodson sought recovery for these amounts; Amoco's Pre-trial Order sought recovery for these amounts; and Amoco, in its Motion for New Trial, concedes that all three claimants are the subject of the settlement and its claim against Woodson. Thus, Woodson would ask this Court to correct its Judgment to reflect that all three claimants are involved.

WHEREFORE, PREMISES CONSIDERED, Third-Party Defendant, WOODSON CONSTRUCTION COMPANY, respectfully requests that this Court deny Amoco's Motion for New Trial and grant Woodson's Motion to Modify Judgment. Woodson further prays for such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

BINGHAM & MANN

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ATTORNEYS FOR DEFENDANT,
WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed withy the Clerk of the Court, on this the 4 day of December, 1992.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

APPENDIX X

United States District Court
Southern District of Texas
FILED
DEC 07 1992
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL.	§	
	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

AMOCO PIPELINE COMPANY'S BRIEF
IN SUPPORT OF ITS MOTION TO
ENTER JUDGMENT

COMES NOW Defendant Amoco Pipeline Company (Amoco), and in support of its Motion to Enter Judgment in its favor for $3,012,500 against Woodson Construction Company (Woodson) would show as follows:

FACTS

This dispute arises out of a lawsuit that three Woodson employees filed against Amoco after a job-site accident. Because the Texas Workers' Compensation Act barred any employee claims against Woodson, Amoco was the lone defendant. Amoco settled those cases for a total of $6,025,000, and now seeks reimbursement of half that

amount from Woodson pursuant to the express agreement of the parties in their contract.

THE CONTRACT

Amoco's claim is based on Section X of the Amoco-Woodson contract of July 2, 1987, which says, in pertinent part:

> The Contractor (Woodson) shall indemnify and save Company (Amoco) harmless from and against any and all losses . . . caused by or resulting from the negligence of the Contractor . . . or from poor, improper or unworkmanlike performance . . . **and the Contractor agrees to reimburse Company for all sums which Company may pay . . . in settlement of any claim on account thereof . . .**

(emphasis added). The critical point is that the contract contains two separate provisions. One provision states that Woodson will indemnify Amoco for losses caused by Woodson. The second provision states that Woodson will reimburse Amoco for sums Amoco spends to settle claims "on account thereof," which refers back to Woodson's "negligence" or its "improper or unworkmanlike performance."

Woodson addresses only the indemnity provision, and argues that it is unenforceable. That argument is incorrect, because Amoco is not seeking indemnity against the consequences of its own negligence. More importantly, Woodson's argument does not even address the separate reimbursement provision, and in fact, virtually concedes that it is unenforceable.

WOODSON'S ARGUMENT

Woodson argues that the Amoco-Woodson contract contains nothing but an indemnity provision. Because the indemnity provision is not sufficiently specific to meet the requirements of **Ethyl Corp. v. Daniel**, 725 S.W.2d 705 (Tex. 1987), Woodson asserts that Amoco can recover nothing from Woodson even though the parties agree that Woodson's acts and omissions were 50% the cause of the accident. Amoco agrees that under **Ethyl**, it cannot recover for the consequences of its **own** negligence, and it has therefore abandoned its efforts to recoup **all** of the amount it paid in settlement.

AMOCO'S ARGUMENTS

1. Amoco Is Seeking To Enforce The Reimbursement Provision, As Well As The Indemnity Provision.

Woodson's basic premise is that Amoco is seeking to enforce an invalid indemnity provision. That premise is wrong. Amoco is seeking to enforce the indemnity provision only with respect to Woodson's own negligence. Moreover, Amoco is seeking to enforce the separate and distinct promise to reimburse it for sums paid in settlement as a result of Woodson's negligence or importer workmanship.

There can be no doubt that the indemnity and reimbursement provisions are separate and independent. As Woodson has pointed out, indemnity is a situation where, by contract, one party agrees to absorb the consequences of an accident irrespective of fault. The term "indemnity," as Woodson uses it, necessarily includes reimbursing Amoco for all sums that Amoco may pay. Thus, if the Amoco-

Woodson contract were nothing but an indemnity provision, the reimbursement provision would be redundant. The only way to make reimbursement language anything other than surplusage is to read it as a separate and free-standing promise.

When the reimbursement provision is read as separate and free-standing, it becomes evident that the Amoco-Woodson contract contains the following provisions:

1. Woodson will indemnify Amoco irrespective of fault.

2. Woodson will reimburse Amoco to the extent of Woodson's fault.

Even if the indemnity provision were invalid under **Ethyl**, the reimbursement provision would be valid. Woodson admits as much in its Brief in Support of Judgment. Woodson says, "Absent a contractual agreement to pay a proportionate share of common liability, Woodson is immune from suit for contribution." (Woodson Brief at ¶ 3.4). That statement of law is correct. But, the reimbursement provision is just such a "contractual agreement," and as Woodson admits, it is enforceable.

A very recent Texas Supreme Court case holds that provisions that are separate and independent from an indemnity agreement are not subject to **Ethyl**. In **Getty v. Insurance Co. of North America**, 36 Tex. S.Ct.J. 169, 1992 WL 324907 (Nov. 11, 1992), the Supreme Court held that a promise to name another party as an additional insured was enforceable without meeting the requirements of **Ethyl**. Although the Court acknowledged that enforcing such a provision could lead to the same result as enforcing an indemnity provision, the Court nonetheless said:

> We decline to extend the express negligence doctrine [of **Ethyl**] to contractual provisions other than indemnity agreements . . .

1992 WL 324907 at 10. Under that reasoning, then, the separate reimbursement provision is enforceable despite any limitations that **Ethyl** may place on the indemnity provision.

Finally, charging Woodson with financial responsibility commensurate with its own degree of fault is consistent with the intent of the parties. At his deposition, Louis Woodson, Woodson's president, was asked to explain Section X of the Amoco-Woodson contract, and he said:

> It means that I am going to hold Amoco--anybody--Woodson would hold anybody lia--will hold you harmless for any work that we do it it's out negligence, if we were negligent. That's what it says.

(Woodson Depo at 67-68). He had already said:

> We hold you harmless for things that we do at Woodson Construction Company but not what Amoco does or causes Woodson to do.

(Woodson Depo at 65). (The relevant portions of Woodson's deposition are tendered as part of Amoco's proposed Findings of Fact and Conclusions of Law filed concurrently with this Brief). So Woodson's understanding and intent was consistent with Amoco's argument that Woodson should reimburse (or indemnify) Amoco to the extent that Woodson was at fault, but not to the extent that Amoco was at fault.

2. **This Court Has Already Ruled That Amoco Has A Claim For Reimbursement In Proportion To Woodson's Fault.**

After this Court permitted Amoco to bring Woodson into this lawsuit, Woodson filed a Motion for Summary Judgment, arguing that all of Amoco's claims against it are barred as a matter of law. Woodson subsequently filed motions to strike Amoco's claims, and made the same arguments. The Court denied Woodson's motions.

The parties then came before this Court, stating that they were engaged in stipulations aimed at simplifying any trial and asking the Court for guidance about why Woodson's Motion for Summary Judgment had been denied. Ultimately, the Court said that it had denied the Motion because a fact issue existed as to the percentage of Woodson's negligence.

Given the written and oral arguments for and against Woodson's summary judgment motion, the only logical interpretation of the Court's ruling was that the Court believed, correctly, that Amoco had a cause of action for reimbursement to the extent that Woodson's negligence or breach or warranty caused the underlying casualty. Both parties proceeded on that basis, and informed the Court on several subsequent occasions that they might be able to stipulate to the percentages of causation, thereby making trial unnecessary.

Ultimately, the parties did agree to apportion causation 50% to Woodson and 50% to Amoco. The parties agreed that this Court would enter judgment based on that stipulation, and that Woodson would retain its right to appeal. As the parties said in response to specific questions from the court, the stipulation would eliminate the need for

trial no matter how the appeal might turn out. At that last conference, Woodson again argued that Amoco had no cause of action against it, but the Court again said that it would not alter its prior ruling, which further reinforces the fact that the previous ruling had been that Amoco had a cause of action for reimbursement.

Based on their understanding of the Court's statements, the parties' stipulations extended to certain collateral matters. For example, in reliance on its understanding of this Court's ruling that it did have a cause of action against Woodson for reimbursement, Amoco agreed to dismiss a separate breach of contract action pending against Woodson in Galveston. Because the parties relied on that understanding, this Court is respectfully urged not to change its prior ruling.

SUMMARY AND CONCLUSION

Woodson continues to argue that Amoco has no claim against it for indemnity. If Woodson means that Amoco cannot recoup all sums paid in settlement of the underlying claims, Woodson is correct, because Amoco's partial fault prevents Amoco from receiving complete indemnity. Amoco is, however, entitled to receive indemnity for Woodson's fault.

Amoco is also entitled to enforce Woodson's separate free-standing agreement to reimburse Amoco for all sums spent settling claims arising out of Woodson's negligence. As Woodson itself tacitly admits, that separate promise is enforceable. The Texas Supreme Court ruled only last month that the restrictions on indemnity provisions do not apply to other provisions in a contract even if those provisions would accomplish the same result as an indemnity provision. Under that new authority, the reimbursement provision is

enforceable. Also, the parties plainly intended that Amoco would receive reimbursement from Woodson for Woodson's fault, ao Amoco is asking for nothing more than Woodson intended to give.

Finally, this Court has previously ruled that Amoco has a cause of action against Woodson for reimbursement. The parties' actions and stipulations demonstrate that both parties had this understanding. The parties, particularly Amoco, relied on those rulings. The Court's prior rulings were correct, and should be affirmed.

For all of the foregoing reasons, this Court should enter judgment in favor of Amoco in the amount of $3,012,500.

Respectfully submitted,

BELL & MURPHY

/s/ illegible
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ATTORNEYS FOR AMOCO PIPELINE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Amoco Pipeline's Brief in Support of its Motion to Enter Judgment** was delivered by hand to

Bradley M. Bingham
Bingham & Mann
1221 Lamar, Suite 1330
Houston, TX 77010

Gary L. Wickert
Hughes, Watters & Askanase
1415 Louisiana, Suite 3700
Houston, TX 77002

on this 7 day of December, 1992.

/s/ Renee Schouest
Renee Schouest

CERTIFICATE

I, CATHERINE LEGER, Notary Public for the State of Louisiana, do hereby certify that the above and foregoing 85 pages of typewritten matter was taken by me and represents a true and correct copy of the proceedings had at the time and place hereinabove set forth on Page one (1) hereof;

IN WITNESS WHERETO, I have hereunto affixed my signature at Morse, Louisiana, on this 8th day of August, 1989.

/s/ Catherine H. Leger
NOTARY PUBLIC

Q. I'll do that.

A. Go ahead and read it.

Q. I want to ask you this first. I'll read the whole thing at the end. "The contractor shall indemnify and save company harmless from and against any and all losses, claims, demands, liability suits or actions". What does that mean to you?

MR. WICKERT: Asked and answered.

MR. KIMMITT: It's never been answered.

MR. WICKERT: I think he said he didn't know.

MR. KIMMITT:

Q Which is what?

A We hold you harmless -- but not against your action. We hold you harmless for things that we do at Woodson Construction Company but not what Amoco does or causes Woodson to do. But we hold you harmless for what we do.

Q Okay.

A But if it's caused by Amoco -- Amoco made us cause -- or didn't really tell us what was on this right-of-way and the condition of the lines we're working over, then we weren't made aware of Woodson.

MR. KIMMITT:

Q What does that phrase that I read mean to you?

A Yeah. But you didn't finish the whole thing. "Caused by or resulting from the negligence of the contractor or any of his subcontractors". See, I'll hold you harmless for that if it's my negligence. I can't answer you if you don't read the whole sentence. I mean you're asking me to tell you something that --

Q No. What I'm asking you to tell me --

A You're just trying to put words in my mouth. I don't know what this means until I read the whole sentence.

Q You've just finished reading it.

A But I can read, too, you know. I've had a little schooling myself, you know.

Q That's fine.

A So if you read the whole thing, then I can tell you what I mean. But I --

Q What does it mean?

A -- I'm not going to tell you -- I'm not going to answer you word by word because I don't know until you finish the whole thing.

Q What does it mean to you?

A It means that I am going to hold Amoco -- anybody -- Woodson would hold anybody lia -- will hold you harmless for any work that we do if it's our negligence, if we were negligent. That's what it says.

Q To who? That's the phrase I was reading. Who would you --

A To the company, which is Amoco.

Q And this is Amoco?

A That's right.

Q For any injuries or damages or whatever?

A Yes. If it's our fault.

Q And I assume that you meant to live up to that obligation to hold Amoco harmless?

A I always do. That's the way I built my business.

Q And that's why you had that six million dollars worth of insurance?

A Not necessarily.

Q Well, why did you have six million dollars worth of insurance?

A Because I wanted -- I don't know why we buy -- we buy -- because the type of work we do is hazardous work, going around lines, digging around lines, and

going under lines and over, so -- and a lot of the companies require that and some of them require more than that.

APPENDIX Y

United States District Court
Southern District of Texas
FILED
JAN 19 1993
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL.	§	
	§	**CIVIL ACTION NO.**
VS.	§	**H-87-4158**
	§	**JURY**
AMOCO PIPELINE COMPANY	§	

AMOCO PIPELINE COMPANY'S MOTION FOR RELIEF FROM JUDGMENT

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW the Defendant and third-party plaintiff Amoco Pipeline Company (Amoco) and pursuant to Rule 60(b)(1) and (3), Federal Rules of Civil Procedure, moves for relief from the Judgment and Order entered in this cause on December 23, 1992,[1] in favor of third-party defendant

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[1] Amoco is aware that a motion under Rule 60 does not suspend the appellate timetable. Amoco must therefore file its notice of appeal on or before January 22, 1993. Despite the general rule that filing of a notice of appeal divests a district court of jurisdiction, the Fifth Circuit has held that a district court retains the power to hear Rule 60(b) motions. Ingraham v. United States, 808 F.2d 1075, 1080-81 (5th Cir. 1987). Should this Court decide to grant Amoco's motion, the proper procedure

Woodson Construction Company (Woodson) for the following specific reasons:

I.

FACTUAL BACKGROUND

This case arises out of injuries to three Woodson employees at an Amoco job-site. Because Woodson was a subscriber to the Texas worker's compensation plan, the employees could not sue Woodson, and therefore sued Amoco, asserting that Amoco's negligence caused the accident. Amoco ultimately settled the three claims for $6,025,000.

As the attached affidavit of Gerard J. Kimmitt shows, Amoco attempted to bring suit against Woodson. Woodson resisted. After Amoco was permitted to bring the claim, Woodson moved for summary judgment on the grounds that the Amoco-Woodson contract was not sufficient to avoid the statutory ban on third-party actions against employers. **In opposing that motion, Amoco never asserted that Woodson was 100% at fault, nor that it (Amoco was not at fault to some degree.** Although the possibility of Woodson's sole negligence was never raised, this Court denied Woodson's motion.

As the Kimmitt affidavit shows, the parties were attempting to settle the case from the outset, but were uncertain about the meaning of the Court's denial of Woodson's summary judgment. At the request of the parties, the Court then clarified its reasoning. In an order

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appears to be to notify the parties, and Amoco will then seek an order of remand from the Fifth Circuit. **Brown v. United Insurance Co. of America**, 807 F.2d 1239, 1241-2 & n.7 (5th Cir. 1987).

dated September 27, 1991, the Court said that the issue precluding summary judgment was "what percentage, if any, of the injuries [of plaintiff] were caused by the negligence **of Woodson**," (emphasis added).

To Amoco and Woodson, that clarification confirmed that in the Court's view, Amoco was entitled to recover its settlement funds in proportion to Woodson's negligence. The reason for that interpretation was that Woodson had argued on any number of occasions that if **Amoco** was negligent in any degree, then Amoco would be unable to recover, whereas Amoco had consistently argued that it could recover in proportion to Woodson's fault. Thus, the Court's statement that the critical issue was **Woodson's** negligence rather than **Amoco's** negligence was consistent with Amoco's argument, but inconsistent with Woodson's argument.

II.

SETTLEMENT NEGOTIATIONS

The parties continued to negotiate a settlement. As the Kimmitt affidavit shows, the basic plan was that the parties would stipulate to their percentages of negligence. The Court would then enter judgment in Amoco's favor consistent with the agreed allocation of negligence, and Woodson would then appeal on the basis that Amoco's claims against Woodson were barred as a matter of law.

As the Kimmitt affidavit shows, Amoco ultimately agreed to stipulate that it and Woodson were both 50% negligent in the underlying accident. However, that stipulation was given only on the understanding that the Court would then enter judgment in Amoco's favor for 50% of the settlement amount.

It is crucial to note that Amoco's stipulation of negligence was a trade-off for the anticipated favorable judgment. Amoco was and is of the view that trial court judgments are more likely to be affirmed than to be reversed because of the deference that appellate courts give to the express or implied fact-findings of the trial court. While Amoco does not believe that it was anywhere near 50% at fault in the underlying accident, it was nonetheless willing to make such a stipulation for purposes of settlement because of what it believed to be the advantages it would have as the result of a judgment being entered in its favor.

As the Kimmitt affidavit and the attached correspondence show, Woodson also believed that the Court would enter judgment in Amoco's favor. Woodson's understanding is shown unmistakably in its letter of September 28, 1992, attached to the Kimmitt affidavit as Exhibit C, in which Woodson's counsel states, in the second paragraph:

> Further my client's assent to the Stipulations was also contingent upon your client's agreement to not seek execution upon or collection of any award or Judgment in Amoco Pipeline Company's favor until final resolution of all appeals . . .

That letter demonstrates Woodson's understanding that the contemplated settlement would result in a judgment being entered against Woodson.

III.

THE JUDGMENT

Once the parties worked out their settlement, Amoco

submitted a judgment reciting that both parties were 50% negligent in the underlying accident, and that on that basis, Amoco could recover from Woodson 50% of its settlement funds. Woodson also submitted its proposed judgment, together with proposed findings of fact and conclusions of law, which repeated again Woodson's argument that because Amoco was partially at fault, Amoco could recover nothing. Woodson had represented to Amoco and to the Court that it was submitting its proposed judgment simply to preserve its appeal.

To the astonishment of all parties, the Court adopted Woodson's proposed judgment, and ruled that because Amoco was partially at fault in the underlying accident, it could take nothing from Woodson. Amoco requested a rehearing. It repeated its substantive arguments, and also pointed out that the Court's action was a reversal of the Court's consistent position throughout the case.

In an effort to preserve its windfall victory, Woodson attempted to argue that this Court had not reversed its prior position. In opposing Amoco's motion for rehearing, Woodson said that the Court's prior ruling denying Woodson's motion for summary judgment and subsequent clarification really meant that Amoco could recover only if Woodson were 100% negligent, but that if Woodson were less than 100% at fault, Amoco could not recover. But as the Kimmitt affidavit and the correspondence during the settlement process demonstrate, that explanation from Woodson is nothing more than an after-the-fact rationalization, and is completely inconsistent with Woodson's prior understanding. By letter of September 22, 1992, attached to the Kimmitt affidavit as Exhibit D, Woodson's counsel states, in the third paragraph;

> Second, our original agreement was a 50-50 stipulation of negligence between Amoco and Woodson. I cannot agree to a stipulation which is to the effect that only Woodson was 50 percent at fault, with the other issue remaining silent. Frankly, this leaves a fact issue unresolved. . . .If we don't make it clear this is a 'joint and concurrent negligence' case, the Fifth Circuit will have no way of knowing this and ultimately deciding the case.

If, as Woodson now argues, the key issue was always the percentage of **Woodson's** negligence, then Amoco's original proposed stipulation would have sufficed. But that was not good enough for Woodson. Woodson demanded a stipulation that **Amoco** was also 50% at fault. Thus, in Woodson's view, the key issue was not Woodson's negligence, but rather, was **Amoco's** negligence.

IV.

THE RELIEF AMOCO SEEKS

Amoco seeks to have the judgment in this case vacated on the grounds that it was obtained by mistake within the meaning of Rule 60(b)(1), Federal Rules of Civil Procedure, (or possibly by misrepresentation within the meaning of sub-section (3) of Rule 60(b), see footnote 1). The judgment is premised upon Amoco's stipulation that it was 50% at fault. That stipulation, in turn, was entered into on the firm and well-founded belief, shared by both Amoco and Woodson, that the Court would enter judgment in

Amoco's favor. That belief was a mistake from which

Amoco seeks relief.[2]

If the judgment is vacated, Amoco will then seek leave to withdraw its stipulation that it was 50% negligent. Amoco contemplates that if it withdraws its stipulation, Woodson may renew its prior motion for summary judgment. Should Amoco not assert that the underlying loss was caused entirely by Woodson's negligence, then Woodson's summary judgment should be granted on reconsideration, assuming, as the Court now says, that the question of Amoco negligence in some degree prevented entry of summary judgment. Amoco would then appeal. If Amoco can persuade the Fifth Circuit that Amoco has a cause of action, the case will be remanded to this Court. Assuming that the issue on remand is the percentage negligence of the parties, Amoco will be free to press its arguments before this Court that its percentage of fault was far less than 50%.

Case law shows that such relief is appropriate under Rule 60(b)(1). In **United States v. Gould**, 301 F.2d 353 (5th Cir. 1962)m the United States had entered into an agreed judgment to pay a certain sum of money for property it had condemned in Florida. The stipulated compensation was based on a plat of the land. When the government learned that the plat was in error, and that the land had actually been designated for streets and public buildings, it sought to vacate the agreed judgment on the basis of mutual

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[2] Amoco has substantiated its belief that Woodson also envisioned judgment being entered in Amoco's favor as a result of the stipulations. If Woodson did not believe that the stipulations would lead to judgment in Amoco's favor, then Amoco could argue that Woodson's acts and statements constituted misrepresentations from which relief may be granted pursuant to Rule 60(b)(3). Amoco does not accuse Woodson of improper conduct, however, because Amoco believes that Woodson was as surprised as Amoco when the Court signed Woodson's proposed judgment.

mistake. Although the trial court denied the motion, the appellate court, under the authority of Rule 60(b)(1), directed that the underlying stipulations be withdrawn, that the parties put on their proof, and that the court then rule on the motion to vacate.

Basic fairness demands that Amoco be granted similar relief. Amoco was willing to stipulate to the amount of its fault only because both it and Woodson envisioned judgment being entered in Amoco's favor. That was an important consideration, because in Amoco's view, appellate courts are more reluctant to reverse a trial court's judgment than to affirm, probably because of the deference given to express or implied fact-finding. Basically, then, Amoco was willing to make what in its view was an over-generous stipulation concerning its own negligence in exchange for a favorable judgment. But if Amoco is not getting what it bargained for in terms of a favorable judgment, it should not be bound by the concessioner stipulation.

V.

SUMMARY AND CONCLUSION

Based on this Court's prior rulings and various discussions with the Court, both Amoco and Woodson believed that in the Court's view, Amoco had a cause of action against Woodson for reimbursement of settlement funds in proportion to Woodson's fault. Based on that belief, Amoco stipulated that it was 50% at fault in the underlying accident. But once that stipulation was made, the Court entered judgment for Woodson rather than for Amoco.

The stipulation arose out of a mutual mistake, and the judgment was predicated on that stipulation. Amoco seeks relief form the judgment on the basis of that mutual mistake.

Once the judgment is vacated, Amoco will withdraw its stipulation.

In light of the Court's present view of the law, Woodson may ask the court to reconsider its prior denial of Woodson's motion for summary judgment. At that point if the Court believes that Amoco cannot recover anything in a concurrent-fault situation, then Amoco could appeal. Amoco is not quarreling with the Court's right to enter judgment reflecting its view of the law, or to reconsider it earlier rulings sua sponte. However, Amoco believes it is fundamentally unfair to bind Amoco to a concessioner stipulation concerning percentages of fault, then deny Amoco the benefit of a judgment in its favor.

Respectfully submitted,

BELL & MURPHY

/s/ illegible
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GERARD J. KIMMITT
TBA No. 11427500
BELL & MURPHY
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Telephone: (713) 871-6700
Facsimile: (713) 871-6767
ATTORNEYS FOR AMOCO
PIPELINE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Amoco Pipeline Company's Motion for Relief From Judgment** was delivered by hand to

BRADLEY M. BINGHAM
BINGHAM & MANN
1221 LAMAR, SUITE 1330
HOUSTON, TX 77010

GARY L. WICKERT
HUGHES, WATTERS & ASKANASE
1415 LOUISIANA, SUITE 3700
HOUSTON, TX 77002

on this 19 day of January, 1993.

/s/ Renee Schouest
Renee Schouest

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL.	§	
	§	**CIVIL ACTION NO.**
VS.	§	**H-87-4158**
	§	**JURY**
AMOCO PIPELINE COMPANY	§	

AFFIDAVIT OF GERARD J. KIMMITT

THE STATE OF TEXAS	§	
	§	
COUNTY OF HARRIS	§	

Then came Gerard J. Kimmitt, II, who being known unto me, and being duly sworn and cautioned, deposed and said as follows:

"My name is Gerard J. Kimmitt, II, I am over the age of 21, have never been convicted of a crime, and am competent to give testimony.

I am a shareholder in the firm of Bell & Murphy and counsel of record for Amoco Pipeline Company (Amoco) in its suit against Woodson Construction Company (Woodson). I have been working with Edward J. Murphy in the handling of this case since its inception and have personal knowledge of the facts contained in this Affidavit.

1. Amoco initially tried to bring suit against Woodson in August, 1989. The request to file a Cross-Action was denied by Magistrate Kelt, without explanation.

2. Following Amoco's request for reconsideration to this Court, the Court granted leave to file the Cross Action against Woodson on June 1, 1990.

3. Woodson filed a Motion for Summary Judgment, alleging Amoco had no cause of action, regardless of the percentage of fault of the parties, because Woodson was the Plaintiff's employer and cannot be sued in any manner for injuries to its employees. Woodson admitted that absent contractual language to the contrary, any suits are barred. Further, Woodson alleged that the contractual language in question did not meet the express negligence test set forth in Ethyl Corporation v. Daniel Construction Company, 725 S.W.2d 705 (Tex. 1987). Amoco filed a response and noted the contractual language in question did provide for recovery from Woodson.

4. The Court denied Woodson's Motion for Summary Judgment on December 12, 1990.

5. Prior to denial of said motion, Woodson and Amoco's counsel had discussed perfecting some type of agreed appeal on the issue of whether Amoco had a cause of action against Woodson.

6. On January 14, 1991, at a hearing before the Court, Woodson attempted to indirectly re-urge its Motion for Summary Judgment. The Court noted that it did not want to entertain any arguments and that it already ruled Amoco had a cause of action. The parties

discussed the case with the Court and advised the legal issue supporting the denial of the Motion for Summary Judgment may be the key to a amicable resolution of the case. The Court suggested that if both parties desired, the parties could request the Court give a more detailed explanation of its ruling.

7. On January 29, 1991, the parties filed a Joint Request for Ruling in which it was noted five possible grounds existed for the denial of the Motion for Summary Judgment. None of those grounds and none of the arguments raised in the Summary Judgment dealt with a possible interpretation of the contract language which would translate into recovery if and only if Woodson was found to be 100% at fault.

8. Over the next several months, trial settings were passed, again due to the fact the parties were awaiting clarification of the Court's ruling on the key legal issue of whether Amoco even had a cause of action.

9. On September 27, 1991, the Court entered an Order sitting it denied Woodson's Motion for Summary Judgment because a fact issue existed as to the percentage, if any, of the injuries suffered by Robert Hamilton was caused by Woodson. Again, no mention was ever made and no implication was raised that the denial of the Motion for Summary Judgment was based on whether all of the accident was attributable to Woodson. The Order clearly pointed out that the basis for

denying the Motion was the open issue regarding the percentage of Woodson's fault, not the percentage of Amoco's fault, if any. The language of the ruling and subsequent discussions with the Court indicated that the percentage of fault found attributable to Woodson would be recoverable by Amoco.

10. Three days later, at a docket call before the Court, the parties noted that discovery had not proceeded. Again, Woodson's counsel attempted to re-urge its position that irrespective of the percentage of fault of the parties, Woodson was not liable to Amoco. The Court stated that it did not want to hear any of these arguments again.

11. Following Woodson's refusal to mediate, Woodson's counsel and I discussed the idea of agreeing to the percentage of fault of the parties and Woodson appealing the Court's denial of the Summary Judgment. We had a number of discussions during which we both freely discussed the Court's "ruling" that Amoco has a cause of action against Woodson for the percentage of Woodson's fault. From a legal perspective, Woodson's counsel disagreed with the Court and wanted to appeal this one legal issue. This understanding of the Court's ruling was the basis of all future negotiations.

12. Throughout the next several months, negotiations were ongoing. The basis was always to allow Woodson to appeal the Court's ruling that Amoco did have a cause of

action. At no time was it ever mentioned that Amoco can only recover in the event Woodson was found to be at fault. On the contrary, Brad Bingham, counsel for Woodson, conceded on a number of occasions that pursuant to the Court's ruling, Amoco could recover whatever percentage of fault was attributed to Woodson. During the initial stages of "settlement" talks, Bingham suggested that the appropriate percentage would be 35%. The parties subsequently agreed to a 50% split of the fault. They intended that judgment be entered in Amoco's favor for 50% of Amoco's damages, but that Woodson would reserve its right to appeal the legal determination by the Court that Amoco would recover in proportion to Woodson's fault.

13. Prior to scheduled trial date of September 1992, negotiations regarding settlement of the case continued in earnest. During all negotiations, the key point was that Woodson be allowed to preserve its error to the Fifth Circuit and whatever settlement numbers were discussed, Woodson insisted on preserving its right to correct what it perceived as the Trial Court's erroneous ruling that Amoco had a cause of action.

14. Knowing that the issue could be appealed after trial, Amoco agreed to Woodson's request, and suggested that an Interlocutory Appeal be sought. Such suggestion would satisfy the

parties' desire to have the legal issue resolved and not have a contingent settlement. Woodson agreed with this tactic.

15. On August 26, 1992, at a docket call, the parties sought the Court's view of an interlocutory appeal wherein Woodson would contest the ruling. The Court was opposed to the granting of any request for interlocutory appeal on the issue of whether Amoco had a cause of action. Again, at that time, the parties discussed the legal issue.

16. At this conference, the parties indicated they were close to settlement and sought guidance from the Court on how to achieve settlement without waiving Woodson's right to appeal. The Court suggested that an Agreed Judgment in Amoco's favor be entered. The Court offered to meet with the parties and assist in any way with the paperwork. The parties were ordered to return in two weeks and announce settlement or be prepared to try the case.

17. The parties did return on September 9, 1992 and informed the Court that the issue of the percentage fault of the parties had been settled with Woodson retaining the right to appeal. Again, discussions were had with the Court on the appellate issue and how best to accomplish the terms of the settlement agreement between the parties and allow Woodson to appeal.

18. At the August 26 and September 9 hearings, the Court questioned counsel as what the agreed legal issue was. The Court then asked counsel if it would likely be reversed by the Fifth Circuit and, if so, would a trial be necessary at that point. The parties disagreed on the question of reversal by the Fifth Circuit but agreed that even if reversed, trial would likely not be necessary since the parties agreed that the key issue was Amoco's right to a cause of action to recover for Woodson's percentage of liability. At both hearings, Woodson's counsel attempted to re-urge its position that irrespective of the fault of the parties Amoco had no cause of action. The Court noted that it had already ruled and was not inclined to listen to this argument further.

19. Following these hearings, counsel for Woodson stated to me that he would begin drafting the Stipulations necessary to support the Judgment and, as I was "victorious", I would of draft the Judgment for the Court to sign.

20. Until September 17, 1992, I was not aware that Woodson intended to submit a Proposed Judgment of its own. Following conversations with Woodson's counsel, it was made clear to me that Woodson was only submitting this Proposed Judgment in order to preserve its appellate point and that pursuant to our settlement agreement and the advises of the Court, the Court would sign the Judgment that I submitted. This was further confirmed by correspondence dated September 17, 1992,

attached as Exhibit "A" to this Affidavit and incorporated for reference thereto. Because we agreed in the settlement to allow Woodson to appeal the Court's ruling and did not object to their effort to preserve its appeal.

21. The parties went back and forth on the wording of the Stipulations. In a letter of September 22, 1992, attached as Exhibit "B" and incorporated for reference hereto, Bingham said that a proposed Stipulation stating that Woodson was 50% negligent was insufficient. He demanded that the Stipulation specify also that Amoco was 50% negligent, and that the joint and concurrent fault of the parties caused the underlying accident.

22. At the time of the entering of the settlement agreement, it was the understanding of the parties that the Court would sign the Judgment submitted to it by Amoco, which said that Amoco was entitled to recover 50% of its damages and Woodson would then have the right to appeal on the one issue of Amoco's right to a cause of action.

23. As confirmation of that agreement and understanding, Woodson's counsel asked that Amoco agree not to execute on the Judgment against Woodson until the appeals process was over. Amoco agreed to that request. Attached as Exhibit "C" to this Affidavit and incorporated for reference hereto is the letter detailing our agreement not to execute on the Judgment to be entered against Woodson.

24. Furthermore, in reliance on representations of Woodson and the Court that our Judgment would be entered, Amoco dismissed its separate breach of contract action against Woodson filed in Federal Court in Galveston. This was part of the settlement agreement and it was discussed with the Court. (See Exhibit "C")

25. The settlement agreement was announced in open court. The agreement contemplated that the Court would sign Amoco's Proposed Judgment and Woodson would appeal. This is evident in Exhibit "C" and was the basis of the Settlement Agreement among counsel. Further evidence of the said Settlement Agreement is the letter of Brad Bingham to the Court dated September 28, 1992, in which it is clear that Bingham expected the Court to sign Amoco's Proposed Judgment and asked the Court to consider his arguments prior to executing Amoco's Proposed Judgment. Again, his stated purpose was to preserve his appellate record. Attached as Exhibit "D" and incorporated for reference hereto is a copy of said correspondence.

26. At no time did the Court expressly or impliedly state that the only way that Amoco can recover was if Woodson was 100% negligent. Furthermore, during the numerous conversations with Woodson counsel regarding settlement, the issue was never raised.

27. The settlement agreement was never, in any

way, tied to an understanding that the Court's previous denial of the Summary Judgment was based on a possible finding of 100% fault on the part of Woodson. On the contrary, the Settlement Agreement was entered into based on the understanding by all the parties that Amoco could recover for the percentage of fault attributable to Woodson, whatever that percentage may be. This was how both parties acted on the Court's previous rulings.

28. Based on my conversations with Amoco before and after this Court entered its judgment, I can state unequivocally that Amoco would never have agreed to stipulate that it was 50% negligent had if not been for the clear understanding of all parties that the Court would then enter judgment for Amoco.

29. The parties further agreed that Amoco's action pending in Louisiana was not, in any way, affected by the Stipulations or Proposed Settlement.

30. The Exhibits attached hereto to this Affidavit are true and correct copies of correspondence received from opposing counsel and are business records of the undersigned.

FURTHER AFFIANT SAYETH NOT.

/s/ Gerard J. Kimmitt, II
Gerard J. Kinnitt, II

SUBSCRIBED AND SWORN TO BEFORE ME on this 19th day of January, 1993.

/s/ Mary S. Pearson
Notary Public in and for
The State of Texas

/s/ Mary S. Pearson
Notary's Printed Name

MARY S. PEARSON
Notary Public,
State of Texas
My Commission
Expires 3-13-95

BINGHAM & MANN **SEP 17 1992**

Attorneys at Law

1221 Lamar, Suite 1330
Houston, Texas 77010
Phone: 713-659-8405
Fax: 713-5407

September 17, 1992

VIA FACSIMILE: 871-6767
Mr. Gerard J. Kimmitt II
BELL & MURPHY
1300 Post Oak Blvd.
20th Floor
Houston, Texas 77056-3095

RE: Civil Action No. H 87 4158; Robert Lee Hamilton, et al vs. Amoco Pipeline Company; In the United States District Court for the Southern District of Texas, Houston Division.

Dear Jerry:

In connection with the documents which we will be filing with the Court in the near future, I propose to file the enclosed, to preserve any error in connection with the issues in dispute. Please let me know if you see any particularly troubling aspects of my doing this.

Thank you very much for your continued courtesies.

Sincerely,

/s/ Bradley M. Bingham
Bradley M. Bingham

BMB:dd
cc: VIA FACSIMILE: 318-2323-0786

Mr. David Blanchet
Attorney at Law
PO Box 3543
Lafayette, LA 70502
w/attachment(s)

EXHIBIT A

BINGHAM & MANN **SEP 29 1992**

Attorneys at Law

1221 Lamar, Suite 1330
Houston, Texas 77010
Phone: 713-659-8405
Fax: 713-659-5407

September 28, 1992

Hon. David Hittner
U.S. District Judge
515 Rusk, 5th Floor
Houston, Texas 77002

RE: Civil Action No. H-87-4158; Robert Lee Hamilton, et al vs. Amoco Pipeline Company; In the United States District Court of the Southern District of Texas, Houston Division.

Dear Judge Hittner:

As the Court will recall, the parties recently advised the Court that they were in the process of entering into Stipulations which, in the minds of the parties, would be dispositive of all fact issues currently pending before the Court in this matter. Toward that end, the parties have both executed a Stipulation which counsel for Amoco Pipeline Company, Gerard Kimmitt, has this day filed with the Court. Mr. Kimmitt has as well filed, I understand, his Proposed Judgment in light of the Court's prior ruling on Woodson's Motion for Summary Judgment and the parties' Joint Request for Ruling.

In connection with the foregoing, then, Cross-Defendant Woodson Construction Company is submitting herewith courtesy copies of its Motion for Judgment and

Request for Findings of Fact and Conclusions of Law as well as its Proposed Findings of Fact and Conclusions of Law and its Proposed Judgment. The originals of these documents have been filed with Mr. Clark's offices.

Woodson would urge the Court to consider the matters raised in its Motion prior to the entry of Judgment, as Woodson believes that under the law it is entitled to Judgment in its favor.

The Court's courtesies in allowing the parties to resolve this matter have been sincerely appreciated.

Sincerely,

/s/ Bradley M. Bingham
Bradley M. Bingham

BMB:dd
Enclosures: As noted above

EXHIBIT B

BINGHAM & MANN

Attorneys at Law

1221 Lamar, Suite 1330
Houston, Texas 77010
Phone: 713-659-8405
Fax: 713-659-5407

SEP 29 1992

September 28, 1992

Mr. Gerard J. Kimmitt II
BELL & MURPHY
1300 Post Oak Blvd.
20th Floor
Houston, Texas 77056-3095

RE: Civil Action No. H-87-4158; Robert Lee Hamilton, et al vs. Amoco Pipeline Company; In the United States District Court for the Southern District of Texas, Houston Division.

Dear Mr. Kimmitt:

Pursuant to your request, I have this day filed with the Court the original Stipulations of Fact, Final Judgment, and Order and Motion for Entry of Judgment, which you sent over by courier, along with the two copies provided for filing.

As you and I agreed, my client's assent to the Stipulations was contingent upon your client's agreement to dismiss the action pending in Galveston, Texas, specifically Cause No. G-92-208, styled AMOCO PIPELINE COMPANY VS. WOODSON CONSTRUCTION COMPANY, pending in the United States District Court for the Southern District of Texas, Galveston Division. Further my client's assent to the Stipulations was also contingent

upon your client's agreement to not seek execution upon or collection of any award or Judgment in amoco Pipeline Company's favor until final resolution of all appeals from the District Court's Judgment in the case referenced above.

I understand the you and your client have agreed to these two conditions of my client's approval of the Stipulations, with the former (concerning the dismissal of the Galveston matter) contingent upon Intervenor Hartford's dismissal of its intervention in this matter. Hartford has advised me, through its attorneys, that it will be dismissing its intervention as soon as the Court accepts our Stipulations.

Thus, and to evidence our agreement to the terms and conditions of my client's consent to the Stipulations as set forth in the second paragraph of this letter, please so indicate your approval by executing the duplicate original of this letter on the space provided below and returning it to my offices for safekeeping.

EXHIBIT C

BINGHAM & MANN SEP 22 1992

Attorneys at Law

1221 Lamar, Suite 1330
Houston, Texas 77010
Phone: 713-659-8405
Fax: 713-659-5407

September 22, 1992

VIA FACSIMILE: 871-6767
Mr. Gerard J. Kimmitt II
BELL & MURPHY
1300 Post Oak Blvd.
20th Floor
Houston, Texas 77056-3095

RE: Civil Action No. H-87-4158; Robert Lee Hamilton, et al vs. Amoco Pipeline Company; In the United States District Court for the Southern District of Texas, Houston Division.

Dear Jerry:

Thank you very much for sending me your proposed Stipulations. I have passed them along to the appropriate individuals for review and comment. In the meantime, I see two problems which I feel must be resolved in connection with your stipulations.

To begin with, in connection with my proposed Stipulation number 10, and your proposed Stipulation number 5, I think we both need to have it broken down more specifically, and lay out the amounts which were paid in actual settlement as opposed to other amounts which were

EXHIBIT D

paid or incurred by Amoco. As you know, the law of contribution and indemnity varies depending upon whether we are talking about contribution or indemnity for settlement payments as opposed to contribution or indemnity for attorney's fees. I think we need to make this clear for the Court, then, and would like your thoughts on this.

Second, our original agreement was a 50 - 50 stipulation of negligence between Amoco and Woodson. I cannot agree to a stipulation which is to the effect that only Woodson was 50 percent at fault, with the other issue remaining silent. Frankly, this leaves a fact issue unresolved. As I am sure your research has revealed, the question of joint or concurrent negligence is handled in a particular way by Texas courts and federal courts construing Texas law. If we don't make it clear this is a "joint and concurrent negligence" case, the Fifth Circuit will have no way of knowing this and ultimately deciding the case. Thus, I would request that we return to the terms of our original agreement, wherein a 50 - 50 split was proposed. Your thoughts?

Finally, have you contacted the Court to see if we can get some additional time? If we don't do anything, I suspect that the Court will simply either dismiss the case or call us all to trial. I know you don't want the case dismissed, and I don't think either one of us wants the case called to trial at this point. Will you be contacting Darleen to see if we can buy a couple of extra weeks?

Thanks for your help.

Sincerely,

/s/ Brad
Bradley M. Bingham

BMB:dd

APPENDIX Z

United States District Court
Southern District of Texas
FILED
FEB 03 1993
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

RESPONSE TO AMOCO PIPELINE COMPANY'S MOTION FOR RELIEF FROM JUDGMENT

COMES NOW Third-party Defendant WOODSON CONSTRUCTION COMPANY ("WOODSON"), and responds to the Motion For Relief from Judgment filed by Defendant and Third-party Plaintiff, AMOCO PIPELINE COMPANY ("Amoco"), and, in support, would respectfully show the Court the following:

I.

INTRODUCTION

1.1 Amoco has filed a Motion for Relief from Judgment. On January 20, 1993, this Court ordered Woodson to Respond to certain specific allegations made by

Amoco. This Response is being filed accordingly, and addresses the matters set forth in the Court's Order of January 20, 1993, as well as Amoco's Motion in general.

II.

NO SHOWING OF MISTAKE OR SURPRISE UNDER RULE 60(B)(1)

A. Matters Specifically Addressed by the Court by Order of 1/20/93.

2.1 Amoco first seeks relief from judgment based on Federal Rule of Procedure 60(b)(1), which provides that a movant may obtain relief from judgment upon a showing of "mistake, inadvertence, surprise, or excusable neglect." Amoco claims "surprise" by contending that "[t]o the astonishment of all parties, the Court adopted Woodson's proposed judgment." This is inaccurate. To begin with, the Court did not adopt Woodson's proposed judgment, but rather entered its own judgment. Further, as shown in Mr. Bingham's affidavit attached hereto and incorporated for all purposes, the only party that might have been "astonished" by this Court's decision was Amoco, not Woodson. Based on the applicable law of indemnity and contribution, Woodson was convinced that it had a valid defense and accordingly presented legal arguments to this Court to support judgment in its favor. Woodson then asked this court to consider, not reconsider, the matters raised and advised this Court that Woodson believed that it was entitled to judgment. Therefore, when this Court entered judgment in accordance with Woodson's position, Woodson was pleased, but certainly not "astonished" by the Court's action. In short, Woodson expected the Court could enter Judgment as it did.

2.2 Amoco also stated that both parties interpreted this Court's denial of Woodson's Motion for Summary Judgment as an implied holding that Amoco would necessarily be entitled to recover an amount proportionate to Woodson's negligence. Amoco then asserts that, based on this alleged mutual misinterpretation of the Court's order, the parties then entered into a Stipulation of liability for the underlying injuries. Again, this is inaccurate. Amoco might have had a mistaken belief that such a denial was a ruling in its favor; however, as Mr. Bingham's Affidavit establishes, Woodson held no such belief. Woodson interpreted the prior ruling to mean simply that there was a material fact issue regarding the amount of Woodson's negligence which precluded summary judgment. Woodson then argued in its Motion for Judgment that under the principles of indemnity and contribution, the prior ruling was totally consistent with a holding that Amoco be denied recovery unless Woodson was 100% negligent. Contrary to Amoco's contention, this argument and the Court's denial of the summary judgment are also totally consistent with Woodson's constant position throughout this case that under the contract, Amoco could not collect if Amoco was negligent in any degree.

2.3 Finally, the Court has directed Woodson to specifically address Amoco's "contentions concerning Woodson's interpretation of this Court's rulings" in this matter. The substance of Amoco's claim, as Woodson understands it, is that Amoco misinterpreted the Court's prior rulings and, based upon this misinterpretation, entered into a Stipulation which ultimately formed the basis for the Court's Judgment in this matter. In order to credibly argue that it is entitled to relief, Amoco has also alleged that this misinterpretation was mutual and that Woodson had drawn the same conclusions from the Court's prior rulings. This is inaccurate. The Affidavit of Bradley M. Bingham, attached, reveals that Woodson had no such preconceived notions

concerning the Judgment in this case, and this is borne out by Woodson's consistent request for Judgment in its favor.

2.4 Amoco's allegations concerning the "mutuality" of any mistake, and its assertion that perhaps it was misled by Woodson, are seen to be unfounded when the chronology of events in this case is set forth clearly, as follows:

DATE	MATTER
September 27, 1991	Court enters Memorandum Opinion detailing the Fact Issue which remains to be resolved.
September 17, 1992	Woodson's counsel provides Amoco's counsel with Motion for Judgment and Proposed Findings of Fact and Conclusions of Law Woodson intends to file with the Court.
September 22, 1992	Woodson's counsel advises Amoco's counsel that the Stipulation between the parties needs to reference Amoco's 50% negligence
September 25, 1992	Woodson's counsel again advises Amoco's counsel that the Stipulation must reference Amoco's 50% negligence (see Exhibit A to Mr. Bingham's Affidavit).
September 28, 1992	Stipulation is filed with the Court.
September 28, 1992	Woodson files its Motion for Judgment with proposed Findings of Fact and Conclusions of Law, moving for Judgment in favor of Woodson.

DATE	MATTER
October 9, 1992	Court enters Judgment in favor of Woodson.
October 26, 1992	Amoco files Motion for New Trial.

Amoco first alludes to the possibility that it was "mistaken" in its Motion for New Trial, despite the obvious fact that on numerous prior occasions, Woodson had clearly asserted its position that it was entitled to Judgment. On two occasions prior to even filing the Stipulation, Amoco had been advised by Woodson's counsel that the Stipulation needed to refer to not only Woodson's negligence but as well Amoco's negligence; surely this should have meant something to Amoco's counsel. Over ten days before the Court actually entered its Judgment in this matter, Woodson filed its Proposed Judgment, Findings of Fact and Conclusions of Law, yet Amoco did not claim "surprise" or "mistake" until well after the Judgment had been signed. If Amoco truly was caught by surprise with the argument that the Court's prior rulings could nevertheless lead to a Judgment in favor of Woodson, that interpretation of the Court's prior rulings would have been evident no later than September 28, 1992, when Woodson filed its Proposed Judgment, Findings of Fact and Conclusions of Law; yet, Amoco waited until after the Court entered Judgment to raise this issue. This reveals quite clearly that Amoco was not surprised by the Court's ruling, or at the very least has no credible grounds to argue that Woodson was surprised -- if this were the case, then surely Amoco would have raised it earlier, when it first became evident.

B. Other Matters Addressed by Amoco.

2.5 Furthermore, even if Amoco entered into a Stipulation of liability for the underlying claims based upon its "surprise" or "mistake" in interpreting this Court's prior order, Amoco is not entitled to relief under Rule 60(b)(1). Such relief is unavailable where there is mere "misjudgment or careless failure to evaluate" on the part of counsel, Chick Kam Choo, 699 F.2d 693 (5th Cir. 1983), or where counsel is ignorant of the law. Nemaizer v. Baker, 793 F.2d 58, 62 (2nd Cir. 1986). An attorney's tactical decisions, even if based on mistaken facts, do not justify relief under this rule. See e.g., Nemaizer v. Baker, 793 F.2d at 62-63 (where counsel's error in not contemplating breadth of stipulation dismissing, with prejudice, state law action was not mistake sufficient to justify relief); Dal International Trading Co. v. Sword Line, Inc., 286 F>2d 523 (2nd Cir. 1961)(where stipulation expunging claim in arrangement proceeding on erroneous belief that such claim was duplication of admiralty suit was not mistake sufficient to reopen proceeding).

2.6 Additionally, Amoco has not shown that, even if it was mistaken or surprised, it would be in the interest of justice to vacate the Judgment. See Compton v. Alton Steamship Co., 608 F.2d 961 (4th Cir. 1979). If this Court were to vacate the judgment and allow Amoco to withdraw the stipulation, not only would Woodson be prejudiced, but based on this Court's view of the law as reflected in the judgment, the result would be the same. At no time has Amoco claimed that it was totally free of negligence. Instead, all its claims have been for reimbursement based on Woodson's percentage of negligence. Therefore, even if Amoco were 1% negligent and Woodson were 99% negligent, Amoco could not collect for Woodson's partial negligence under the law of this Court.

2.7 Also, in filing this motion, Amoco is attempting to relitigate issues already before the court. "[A] party cannot have relief under Rule 60(b)(1) merely because he is unhappy with the judgment." United States v. O'Neil, 700 F.2d 361, 373 (5th Cir. 1983)(citing 11 Wright & Miller sec. 2858 at 170). In its Brief in Support of its Motion to Enter judgment and its Motion for New Trial or to Alter or Amend Judgment, Amoco argued that it entered in the liability stipulation based on its reliance on the Court's denial of the summary judgment. This Court expressly refused to alter or amend the judgment based on that ground. This motion, therefore, is just an attempt to get the Court to "change its mind." See United States v. Williams, 674 F.2d 310, 313 (4th Cir. 1982). If Amoco feels that this Court erred in its ruling of law, the proper avenue for addressing such error is by appeal, and not by a Rule 60(b) motion.

III.

NO SHOWING OF MISREPRESENTATION UNDER RULE 60(B)(3)

3.1 Amoco also seeks relief from the judgment under Rule 60(b)(3) based on Woodson's "misrepresentations" that it believed judgment would be entered in Amoco's favor. Under this rule, Amoco must prove the existence of such misrepresentation by "clear and convincing evidence" and show that such misconduct prevented it from fully and fairly presenting its case. Wilson v. Thompson, 638 F.2d 801 (5th Cir. 1981). Mr. Bingham has testified by affidavit that throughout this proceeding, Woodson realized that this Court could enter judgment for either party. At no time did Woodson express a contrary opinion or intentionally or impliedly mislead Amoco into believing that judgment should be entered for Amoco. Not only is there no evidence that Woodson made

misrepresentations that induced Amoco to enter into a stipulation of liability, but there is no showing that Amoco's case was not fully presented to the Court.

IV.

CONCLUSION

4.1 In summary, Amoco is not entitled to any relief from the judgment based on its Rule 60(b) Motion due to the "mistake" or "surprise" of either party or due to any "misrepresentations" on the part of Woodson. As the Court concluded in its order of December 23, 1992, denying Amoco's Motion for New Trial, "Amoco simply misinterpreted [the] Court's denial of summary judgment, and that is an insufficient basis on which to amend or alter a judgment in conformity with the law."

WHEREFORE PREMISES CONSIDERED, Third-Party Defendant, WOODSON CONSTRUCTION COMPANY, respectfully requests that this Court deny Amoco's Motion for Relief from Judgment and for such other and further relief to which it may be entitled.

Respectfully submitted,

BINGHAM & MANN

/s/ Bradley M. Bingham

BRADLEY M. BINGHAM
State Bar No. 02322400
1221 Lamar, Suite 1330
Houston, Texas 77010
Telephone: (713) 659-8405
Facsimile: (713) 659-5407

ATTORNEYS FOR DEFENDANT,
WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this the 3d day of March, 1993.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON,	§	
ET AL	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

AFFIDAVIT OF BRADLEY M. BINGHAM

STATE OF TEXAS §

COUNTY OF HARRIS §

On this the 2nd day of February, 1993, before me the undersigned authority, personally appeared Bradley M. Bingham, who being known unto me, and being duly sworn, did depose and state as follows:

1. "My name is Bradley M. Bingham. I am over the age of 21, have never been convicted of a crime, and am competent to give testimony.

2. "I am a partner in the firm of Bingham & Mann and counsel of record for Woodson Construction Company (Woodson) in the suit which Amoco Pipeline Company (Amoco) has brought against it. I have been handling this case on behalf of Woodson since its inception and have personal knowledge of the facts contained in this Affidavit.

3. "Woodson's position throughout this case has been that the contract upon which Amoco's claim is based

does not entitle Amoco to recover from Woodson. In all my conversations with Amoco's counsel and in document filed with the Court, I have expressed this position.

4. "I was not 'astonished' by the Court's ruling in Woodson's favor because, in accordance with my research, I felt that this was a correct application of the law. Both my client and I were pleased, but not surprised, when the Court entered judgment for Woodson. I anticipated this result as evidenced by the fact that I filed a Motion for Entry of Judgment, with Proposed Findings of Fact and Conclusions of Law. At no time did I represent or imply to Amoco's counsel that I interpreted the Court's prior rulings as necessarily implying that Amoco was entitled to a Judgment for Woodson's percentage of fault.

5. "On September 27, 1991, this Court entered an order stating that it denied Woodson's Motion for Summary Judgment based on the existence of a material fact question of what percentage, if any, of the underlying injuries were caused by Woodson. I did not interpret the Court's holding to imply that Amoco would necessarily be entitled to recover an amount proportionate to Woodson's negligence. Rather, I read the Court's holding to mean simply that there was a fact issue concerning the percentage of fault to be assessed against the parties in this action which precluded summary judgment.

6. "I realized that the Court's order clarifying its denial of summary judgment did not necessarily embrace the position of either party. I understood that the holding could imply that Amoco would be entitled to recover only if Woodson were 100% at fault. At the same time, I realized that the holding could have been interpreted as claimed by Amoco. Therefore, throughout negotiations, I was of the opinion that the Court could rule in favor of either party. At

no time did I express a contrary opinion to Amoco's counsel or otherwise intentionally or impliedly mislead Amoco or its counsel to misinterpret this Court's prior rulings. Indeed, in my correspondence to Mr. Kimmitt of September 25, 1992, Exhibit "A", I expressly told Amoco's counsel that I intended to seek Judgment based upon the Court's ruling.

7. "On September 17, 1992, I informed Amoco's counsel that I intended to file documents 'to preserve any error in connection with the issues in dispute.' On September 22, 1992, I informed Amoco's counsel that I would not agree to a stipulation that Woodson was 50% at fault without a like stipulation that Amoco was 50% at fault, because I believed that for final disposition, both parties had to stipulate to their respective percentages of negligence. On September 28, 1992, I asked Amoco to agree not to execute on any judgment against Woodson until after appeal. In each instance, while I took these actions to preserve my client's rights on appeal in the event of a judgment to preserve my client's rights on appeal in the event of a judgment adverse to Woodson, they were not an acknowledgement or a representation to Amoco's counsel that Amoco was entitled to judgment.

8. "On September 28, 1992, I informed this Court that both counsel had each agreed to stipulate to a percentage of fault, which would then enable the Court to enter a judgment based upon the applicable law. On that date, I filed Woodson's Motion for Judgment and Request for Findings of Fact and Conclusion of Law as well as its Proposed Findings of Fact and Conclusions of Law and its Proposed Judgment, which reflect Woodson's position that Woodson, not Amoco, was entitled to judgment. At no time did I state or infer to Amoco's counsel that it was a foregone conclusion that the Court would enter judgment in favor of Amoco, and at no time did I state or infre to Amoco's

counsel that Woodson was giving up any of its rights to seek a judgment in its favor. As indicated in that letter of September 28th to the Court, I urged the Court 'to consider the matters raised' in Woodson's motions and stated that 'Woodson believes that under the law it is entitled to Judgment in its favor.'

9. "At no time prior to the filing of Amoco's Rule 60 Motion did Amoco's counsel advise me that he was of the opinion that not only Amoco but as well Woodson had allegedly misinterpreted this Court's prior Rulings, despite my filing on behalf of Woodson a Motion for the Entry of Judgment and similar documents setting forth our position. Throughout my discussions with Amoco's counsel I made it clear that while I was concerned about preservation of error for appellate purposes, I nevertheless was of the opinion that Judgment should be entered in favor of Woodson. Indeed, when I tendered my proposed Judgment, Findings of Fact, and Conclusions of Law, and Motion for Entry of Judgment to Amoco's counsel, he did not claim 'surprise' or make mention of any 'mistake' on the part of Amoco or Woodson during our numerous phone conversations thereafter prior to entry of the Court's Judgment.

10. "As Mr. Kimmitt points out, we had a number of discussions concerning how to resolve this case in light of the Court's rulings on the Motion for Summary Judgment. These discussions, however, were not limited to or based upon an agreement that Woodson would necessarily be the appealing party. This is clearly documented in my letter of September 25, 1992, attached, wherein I proposed 'once we get the stipulation finalized, I propose that we file it jointly, and that we each file Motions for the Entry of Judgment and proposed Findings of Fact and Conclusions of Law, with Proposed Judgments.' This suggestion that both parties move for Judgment, and Woodson's position that it was

entitled to Judgment, was repeated throughout my discussion with Mr. Kimmitt. The parties were in agreement that the matter would be resolved through appeal, then, but there was no agreement or misrepresentation about who the appealing party would be.

11. "Attached is Exhibit 'A', a Facsimile letter which I wrote to Gerard Kimmitt, counsel for Amoco, pointing out that in order to enter into the Stipulation, it would be necessary for the parties to address not only Woodson's percentage of fault but as well Amoco's percentage of fault."

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

SUBSCRIBED AND SWORN TO before me by the above, the undersigned authority on this the 2nd day of February, 1993.

/s/ Maria I. Hubig
MARIA HUBIG
Notary Public in and for the
STATE OF TEXAS
My Commission Expires: 2/5/94

MARIA I. HUBIG
Notary Public, State
of Texas
My Commission Expires
FEB. 5, 1994

BINGHAM & MANN

Attorneys at Law

1221 Lamar, Suite 1330
Houston, Texas 77010
Phone: 713-659-8405
Fax: 713-659-5407

9/25/92

TO: JERRY KIMMITT/871-6767
FROM BRAD BINGHAM

RE: AMOCO VS. WOODSON

JERRY:

ATTACHED IS YOUR PROPOSED STIPULATION WITH THE CHANGES I SEE NEED TO BE MADE:

1. IN PARAGRAPH 2, WE NEED THE LANGUAGE CONCERNING THE FACT THAT WOODSO'S COMP CARRIER PAID THE COMP BENEFITS RECEIVED BY HAMILTON, ET AL.

2. THERE WAS A "TYPO" IN YOUR RECITATION OF THE CONTRACT LANGUAGE.

3. IN PARAGRAPH 5, WE NEED THE INSERTION, AS INDICATED OF THE FOLLOWING: "BY VIRTUE OF THE SETTLEMENT".

4. FINALLY, IN PARAGRAPH 7, WE NEED THE STIPULATION TO INCLUDE THAT AMOCO'S NEGLIGENCE WAS 50% OF THE CAUSE OF THE INCIDENT.

ADDITIONALLY, WE WILL NEED TO RESOLVE THE MATTER OF THE "AGREEMENT". ALL WE NEED, FROM OUR END, IS SOME AGREEMENT TO THE EFFECT THAT:

1. THE JUDGMENT WILL NOT BE EXECUTED UPON PENDING EXHAUSTION OF ALL APPEALS; AND,

2. THIS STIPULATION WILL NOT BE BINDING UPON ANYONE ELSE, ANYWHERE ELSE.

YOUR THOUGHTS?

ONCE WE GET THE STIPULATION FINALIZED, I PROPOSE THAT WE FILE IT JOINTLY, AND THAT WE EACH FILE MOTIONS FOR THE ENTRY OF JUDGMENT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH PROPOSED JUDGMENTS.

WITH THESE REVISIONS/ADDITIONS, I HAVE PERMISSION FROM MY PEOPLE TO ENTER INTO THE STIPULATION.

THANKS.

/s/ Brad
BRAD

DEFENDANT'S EXHIBIT A

APPENDIX AA

United States District Court
Southern District of Texas
FILED
FEB 05 1993
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL.	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	**H-87-4158**
	§	**JURY**
AMOCO PIPELINE COMPANY	§	

AMOCO PIPELINE COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR RELIEF FROM JUDGMENT

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, Defendant and Third-Party Plaintiff, Amoco Pipeline Company (Amoco) and, files its Reply in Support of its Motion for Relief from Judgment.

We read Woodson's Response and Mr. Bingham's Affidavit -- Integrity is the key to the practice of law. Winning at all costs that results in compromise or loss of integrity is a price too great to pay.

Amoco expected Mr. Bingham to be forthright in his Response. We expected that he would clearly admit that

both Amoco and Woodson interpreted the Court's prior rulings to imply a holding in Amoco's favor and that a judgment in Amoco's favor would be entered. Last week, Mr. Bingham called and told Mr. Kimmitt, one of the Amoco attorneys, that he had expected the Court to sign the Amoco judgment, but was always hopeful that the Court would change its mind and reconsider its prior decisions because he thought that the Court was wrong.

Yet, he filed an affidavit skirting the truth and dancing around the issue the Court ordered to be addressed -- the parties understanding and expectation concerning the Court's prior ruling. His affidavit does not deal directly with the question. Instead, he states in an underlined portion of his affidavit, paragraph 8, that he never stated that it was a "foregone conclusion" that the Court would enter judgment in favor of Amoco. That is correct, but that is not the issue.

He did expect the Court to sign Amoco's judgment or else why would he have insisted that Woodson have a right to appeal? In Exhibit A to Amoco's Motion, a September 17, 1992, a letter from Bingham, he stated that he is going to file some documents "... to preserve any error in connection with the issues in dispute."

His letter of September 28, 1992, to the Court, Exhibit B to Amoco's Motion, makes it clear that he understood the prior rulings to be in Amoco's favor. He states:

> "Mr. Kimmitt has as well filed, I understand, his Proposed Judgment in light of the court's prior ruling on Woodson's Motion for Summary Judgment ..." (emphasis supplied)

Additionally, it is clear that Woodson expected the Court to enter judgment in Amoco's favor against Woodson in accordance with its prior ruling. Why else would Mr. Bingham be seeking Amoco's agreement not to execute on the judgment? See Exhibit A to Bingham's affidavit. Woodson's expectation and understanding is clear in Mr. Bingham's September 28, 1992, letter to Mr. Kimmitt, Exhibit C to Amoco's Motion. In paragraph 2 he states:

> "Further, my clients [Woodson] assent to the Stipulations was also contingent upon your clients' [Amoco] agreement to not seek execution upon or collection of any award or judgment in Amoco Pipeline Company's favor until final resolution of all appeals from the District Court's Judgment in the case referenced above." (emphasis supplied)

In sum, when the Court reviews the Bingham affidavit we request that it be read for what it does not state and for what issues are not dealt with straight-forwardly. Read in that manner and combined with what the Exhibits do state, the Court should conclude that both Amoco and Woodson interpreted this Court's denial of Woodson's Motion for Summary Judgment as an implied holding that Amoco would be entitled to recovery and that Amoco's Proposed Judgment would be entered by this Court. Accordingly, Amoco respectfully requests that its Motion for Relief from Judgment be granted.

Respectfully submitted,

By: /s/ Edward J. Murphy
EDWARD J. MURPHY
TBA No. 14697500
1399 Post Oak Boulevard
20th Floor
Houston, Texas 77056
Telephone: (713) 871-6700
Facsimile: (713) 871-6767

ATTORNEY-IN-CHARGE FOR
AMOCO PIPELINE COMPANY

OF COUNSEL:
BELL & MURPHY
GERARD J. KIMMITT
TBA No. 11427500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Amoco Pipeline Company's Reply in Support of its Motion for Relief From Judgment** was hand delivered to

Bradley M. Bingham, Esq.
Bingham & Mann
1221 Lamar, Suite 1330
Houston, Texas 77010

on this 5th day of February 1993.

/s/ Vicky J. Howell
Vicky J. Howell

APPENDIX AB

United States District Court
Southern District of Texas
FILED
FEB - 8 1993
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL	§	
	§	
	§	CIVIL ACTION NO.
VS.	§	H-87-4158
	§	JURY
AMOCO PIPELINE COMPANY	§	

SUPPLEMENTAL RESPONSE OF WOODSON CONSTRUCTION COMPANY TO DEFENDANT AMOCO'S MOTION FOR RELIEF FROM JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WOODSON CONSTRUCTION COMPANY, Third-Party Defendant in the above styled and entitled cause, and supplementally responds to Third-Party Plaintiff and Defendant Amoco Pipeline Company's Motion for Relief from Judgment, and would show the Court the following:

I.

WOODSON CONSTRUCTION COMPANY ("WOODSON") has received AMOCO PIPELINE COMPANY's ("AMOCO") "Reply in Support of its Motion

for Relief from Judgment." WOODSON believes that it has fully, accurately, and in a forthright manner addressed the matters raised by the Court in its Order of January 20, 1993, and thus does not feel that a further response on the substantive issues is required. Nevertheless, AMOCO makes the assertion that WOODSON has engaged in "skirting the truth" and "dancing around the issue" before the Court. In this regard, WOODSON respectfully requests that it be given the opportunity to further address the specific matters about which the Court is concerned, should the Court be of the opinion that WOODSON has not fully addressed the issues in its original Response. At this point, however, WOODSON would simply advise the Court that AMOCO's recitation of Mr. Bingham's telephone conversation with Mr. Kimmitt, set forth in the third paragraph of AMOCO's reply, is inaccurate, Further, the conclusions which AMOCO draws based upon Woodson's good faith attempts to ensure that, regardless of how this Court ruled, any error was preserved for appellate review, are inaccurate.

II.

Further, it is clear that AMOCO's counsel is very angry at WOODSON's counsel. Nevertheless, AMOCO's personal attacks upon WOODSON's counsel go beyond the legitimate bounds of good faith argument and pleading and contain allegations which, WOODSON submits, are entirely inappropriate for a pleading before this Honorablt Court. Thus, WOODSON respectfully submits that AMOCO's Reply, at least to the extent it contains personal attacks upon the integrity of counsel, should be stricken pursuant to the provisions of Rule 12(f), as impertinent and scandalous.

WHEREFORE, PREMISES CONSIDERED, WOODSON respectfully urges that the Court deny AMOCO's Motion and enter such other Orders as are appropriate and just under the circumstances.

Respectfully submitted,

BINGHAM & MANN

/s/ Bradley M. Bingham
By: Bradley M. Bingham

State Bar No. 02322400
1221 Lamar, Suite 1330
Houston, Texas 77010
Telephone: (713) 659-8405
Facsimile: (713) 659-5407

Attorney-in-Charge for
WOODSON CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this the 8 day of February, 1993.

/s/ Bradley M. Bingham
Bradley M. Bingham

APPENDIX AC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2138

ROBERT LEE HAMILTON, ET AL.,
Plaintiffs,
VS.
AMOCO PIPELINE COMPANY,
Defendant-Third Party
Plaintiff-Appellant
VS.
WOODSON CONSTRUCTION COMPANY
Third Party Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

BRIEF FOR DEFENDANT-THIRD PARTY
PLAINTIFF-APPELLANT
AMOCO PIPELINE COMPANY

Edward J. Murphy
Gerard J. Kimmitt
John F. Waldo
BELL & MURPHY
1300 Post Oak Blvd. Suite 2000
Attorneys for Defendant-Third Party Plaintiff-
Appellant Amoco
Pipeline Company

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and companies have an interest in the outcome of this case. This representation is made in order that Judges of the Court may evaluate possible disqualification or recusal.

Parties: Amoco Pipeline Company
Defendant-Third Party Plaintiff-Appellant

Woodson Construction Company
Third Party Defendant-Appellant

Counsel: Edward J. Murphy
Gerard J. Kimmitt
John F. Waldo
BELL & MURPHY
Houston, Texas

Insurers: Liberty Mutual Insurance Company
(Woodson's insurer)

Vesta Insurance Company
(Amoco's insurer)

Note--The named plaintiffs, Robert Lee Hamilton et al., have received settlements from Amoco Pipeline Company and/or its insurers, and are therefore not persons interested in the outcome of this appeal despite their nominal status as parties.

STATEMENT REGARDING ORAL ARGUMENT

Amoco requests oral argument. Amoco's principal contention is that new and controlling Texas Supreme Court case law has brought about a significant change in the law of indemnity. Given the frequency with which indemnity questions arise, resolution of that issue is important. If this Court is inclined to do anything other than remand to the District Court with instructions that it make the necessary fact-findings, Amoco would request oral argument.

Amoco's second prayer for relief also has significant precedential value concerning the interpretation and enforcement of promises in a work contract other than promises specifically suggests that a full airing of the possible implications of Amoco's argument is warranted, and this can best be accomplished by oral argument.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-2138

ROBERT LEE HAMILTON, ET AL.,
Plaintiffs,

VS.

AMOCO PIPELINE COMPANY,
Defendant-Third Party
Plaintiff-Appellant

VS.

WOODSON CONSTRUCTION COMPANY
Third Party
Defendant-Appellee

INTRODUCTION

Defendant/Third-Party Plaintiff/Appellant Amoco Pipeline Company ("Amoco") submits this brief in support of its consolidated appeal 1) from a final judgment entered in this case denying Amoco contractual indemnity or contribution from Third-Party Defendant/Appellee Woodson Construction Company ("Woodson"), and 2) from an order denying Amoco relief from a stipulation concerning its fault in the underlying case. The District Court denied Amoco indemnity on the basis that the indemnity provision did not meet the Texas express negligence test. However, a Texas Supreme Court decision handed down after this appeal was filed fundamentally changed Texas indemnity law, and held

that the express negligence test does not apply when the indemnitee has actual notice or knowledge of the indemnity provision. Amoco therefore seeks a remand to give the District Court the opportunity to conduct the fact-finding mandated by that new opinion.

Alternatively, Amoco would show that the District Court's denial of indemnity was an erroneous interpretation of Texas law at the time of the decision, and would ask this Court to reverse and render judgment for Amoco.

Finally, Amoco would show that the District Court changed its mind between its initial and final rulings on the applicability of the express negligence doctrine. While Amoco does not question the District Court's right to change an interlocutory ruling, Amoco should have been allowed to withdraw certain factual stipulations it made in reasonable reliance on that preliminary ruling.

I.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the final judgment of the District Court pursuant to 28 U.S.C. § 1291.

Amoco was originally sued in Texas state court by Robert Lee Hamilton, one of three individuals who were injured in an on-the-job accident, and members of Hamilton's family. Amoco removed the action to federal court pursuant to 28 U.S.C. § 1441 because Amoco was not a citizen of Texas, and its citizenship was diverse to that of any of the plaintiffs. Woodson intervened to file a claim for equipment damage, and Amoco cross-claimed against Woodson for indemnity or contribution.

II.

STATEMENT OF THE ISSUES

Amoco settled personal-injury claims of the two Woodson employees that had been filed in Texas and one that had been filed in Louisiana, then sought contractual indemnity or contribution from Woodson in this case and in an independent action in Louisiana pursuant to provisions of a contract by which Amoco hired Woodson. Amoco and Woodson stipulated that each was 50% at fault for the underlying accident. On the basis of that stipulation, the District Court held that because the indemnity language in the Amoco-Woodson contract was not specific enough to satisfy the "express negligence" standard of Ethyl Corp. v. Daniel, 725 S.W.2d 705 (Tex. 1987), Amoco would take nothing.

After this appeal was filed, the Texas Supreme Court again addressed the indemnity problem in the case of Page Petroleum, Inc. v. Dresser Industries, Inc., 36 Tex. S. Ct. J. 737 (April 7, 1993). In that case, the Texas court expanded Ethyl by adding a requirement of "conspicuousness" to the requirement of "express negligence." The court called those two requirements, together, the "fair notice" provisions of an indemnity agreement. The Texas court mitigated the harshness of Ethyl by declaring that, "The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement." Id., 36 Tex.S.Ct.J. 737, 739 & n.2.

This factual and legal setting presents three issues:

1) If Woodson had actual notice or knowledge of the indemnity agreement, is the indemnity agreement enforceable even if it does not meet the express negligence test? Because that issue is a pure question of law, review is de novo, although an affirmative determination would obviously

require a remand to allow the district Court to ascertain whether such actual notice or knowledge existed.

2) Did the Amoco-Woodson contract contain a promise separate and independent from the indemnity agreement that is enforceable despite the strictures of Ethyl? Because the Amoco-Woodson contract is unambiguous, this issue is a pure question of law, and review is de novo.

3) Is Amoco entitled to relief from its stipulations regarding apportionment of fault, which relief was sought on the basis that the stipulation was entered into based on a reasonable belief that the District Court would award Amoco a judgment for 50% of its settlement funds? Because Amoco sought relief pursuant to Rule 60(b), Fed. R. Civ. P., the District Court's denial of Amoco's requested relief is reviewable for abuse of discretion. Williams v. Brown & Root, Inc., 828 F.2d 325, 328-29 (5th Cir. 1987).

III.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the District Court.

This is a familiar indemnity problem. Three Woodson employees were injured while working on an Amoco job site, and one of them, Hamilton, sued Amoco for negligence in this action. (R 12-6). Woodson was immune from direct suit by the injured men, but it intervened in Hamilton's suit and sought to recover for certain equipment that was harmed in the accident. (R 218-14). Amoco then filed its own cross-claim against Woodson for indemnity or contribution. (R 685-25). Ultimately, Amoco settled the underlying case, (R 980-79), so the only disputed issue was Amoco's claim against Woodson.

Woodson moved for summary judgment, claiming that it was immune from a direct action by Amoco and that the indemnity provisions of its contract with Amoco were invalid. (R 624-566). The District Court denied that motion. (R 892). Upon request of the parties, the District Court declared that Woodson's percentage of negligence was the disputed fact issue that precluded summary judgment. (R 980-79).

Amoco reasonably interpreted the District Court's statement as a declaration that Woodson would be liable to Amoco in proportion to Woodson's negligence. (R 1113-02). In reasonable reliance on that interpretation, Amoco agreed to a settlement with Woodson that involved, in part, a stipulation that Amoco and Woodson were each 50% at fault. (R 1048-46). When the parties submitted their stipulation and cross-moved for judgment, the trial court entered judgment for Woodson, holding that because Amoco was partially at fault, the indemnity provision of its contract

with Woodson was void. (R 1045-43).

Amoco then moved for a new trial, or to alter or amend the judgment. (R 1053-51). That motion was denied. (R 1089-85).

Finally, Amoco sought relief under Rule 60(b), Fed. R. Civ. P., from its stipulation of partial fault. (R 1123-1097). Amoco argued that the stipulation was part of a settlement in which Woodson had agreed, at least tacitly, that judgment would be entered against it for 50% of the amount Amoco paid to settle the underlying claims. (R 1121-20). Amoco argued that if the judgment was not going to be entered in accordance with the parties' understanding, Amoco should be entitled to withdraw the stipulation. (R 1117-16). That motion was also denied. (R 1151).

Amoco timely filed notices of appeal from the trial court's denial of Amoco's motion for a new trial, (R 1143-42), and subsequently filed a notice of appeal from the trial court's denial of relief under Rule 60(b).[1] (R 1158-57). Those appeals have been consolidated.

B. Statement of Facts.

This case arises from a job site accident in which three Woodson employees were burned while replacing an Amoco pipeline. Because Woodson was a subscriber to the Texas Worker's Compensation scheme, the three could not sue Woodson directly, so they sued Amoco (in separate proceedings), alleging that Amoco had control of the job site

---

[1] After all of the foregoing occured, the trial court entered a separate document denominated "final judgement " in which it again denied all relief to Amoco. (R 1155). To protect againstany uncertainties over which document could be construed as the appealable final order within trhe meaning of the Rule 58, Fed. R. Civ.PP. Amco filed a protective notice of appeal from that later order. (R 1161-60).

and failed through its negligence to make the job site safe. (R 12-6). Ultimately, Amoco settled the three lawsuits for a total of $6,025,000. (R 1047).

Amoco filed a third-party action against Woodson, arguing that to the extent Woodson caused the underlying loss, Woodson should reimburse Amoco for the amounts that Amoco paid to the plaintiffs. (R 682-79). Woodson moved for summary judgment. Woodson pointed out that under the Texas Worker's Compensation Act, a subscribing employer is immune from indemnity or contribution claims brought by third-party tortfeasors except to the extent that the employer contracts away that immunity. (R 623-22). Woodson acknowledged, of course, that it had a contract with Amoco that contained an indemnity provision. However, Woodson argued that under the rule of Ethyl v. Daniel, 725 S.W.2d 705 (Tex. 1987), an indemnitee who is negligent is whole or in part can be indemnified only if the contract expressly states that the indemnity provision applies even if the indemnitee is negligent. (R 622-19). Woodson argued that because the indemnity provision in the Amoco-Woodson contract did not expressly state that Amoco would be indemnified against the consequences of its own negligence, Woodson argued that the provision was invalid, so that the statutory barrier to suit still applied. (R 618).

In response to Woodson's motion for summary judgment, Amoco did not argue that the language of its contract satisfied the express-negligence test of Ethyl. Rather, Amoco argued that it was not seeking indemnity for its own negligence, but was seeking indemnity only for Woodson's negligence, so that the Ethyl rule did not apply. (R 768-63).

The trail court appeared to agree with Amoco. It denied summary judgment. (R 892). Upon motion of the parties to clarify the reasons for that denial, the trial court said the dispositive and unresolved fact issue was "What

percentage, if any, of the injuries suffered by plaintiff Robert Lee Hamilton ("Hamilton) were caused by the negligence of Woodson." (R 979, emphasis added).

Amoco knew that if the Ethyl rule were applied, the dispositive issue would be whether the party seeking indemnity is negligent, meaning that if Ethyl were applied to this case, the only fact issue would be whether Amoco was negligent, not whether Woodson was negligent. Yet the trial court ruled that Woodson's negligence rather than Amoco's negligence was the dispositive fact issue. (R 980-79). Amoco therefore reasonably interpreted the trial court's ruling to be that the Ethyl rule did not apply to this case, and that Amoco could recover in proportion to Woodson's negligence.

That interpretation by Amoco was consistent with Woodson's understanding of the contract. At his deposition, Louis Woodson, the president of Woodson, was asked to explain the indemnity provision of the Amoco-Woodson contract. He said:

> It means that I am going to hold Amoco--anybody--Woodson would hold anybody lia--will hold you harmless for any work that we do if it's our negligence, if we were negligent. That's what it says.

(R 1072-71). He also said:

> We hold you harmless for things that we do at Woodson Construction Company but not what Amoco does or causes Woodson to do.

(R 1073).

Although Woodson and Amoco were at odds over the law applicable to this situation, they were less at odds over the facts. They stipulated that the $6,025,000 that Amoco

paid to settle the underlying cases (including litigation costs and attorneys fees) was reasonable and necessary (R 1047). They also stipulated that the underlying accident was caused 50% by the negligence of Woodson, and 50% by the negligence of Amoco. (Id.)

As part of the overall agreement, Amoco dismissed a separate action that it had filed against Woodson, in which it contended that Woodson breached a contract to Amoco by failing to have Amoco named as an additional insured on Woodson's insurance policies. (R 1099). In dismissing that action, Amoco changed its position to its own detriment in reliance on the settlement agreement.

When Amoco and Woodson presented their stipulation to the trial court, each side moved for judgment. Amoco moved for a judgment awarding it 50% of the amount it had spent on the underlying claims, or $3,012,500. Woodson again moved for entry of a take-nothing judgment, once again arguing that under the rule of Ethyl, Amoco, as a negligent indemnitee, could recover nothing.

This time, the trial court ruled for Woodson. (R 1045-43). The court declared that under Ethyl, an indemnity provision that does not meet the "express negligence" test cannot be enforced by an indemnitee who was negligent in whole or in part. (R 1044). The court said that based on Amoco's stipulation of some negligence, the indemnity agreement was unenforceable, and Amoco would take nothing from Woodson.

Amoco filed a motion for a new trial. (R 1053-51). Amoco pointed out that subsequent to the original briefing, the Texas Supreme Court held in Getty v. Insurance Company of North America, 845 S.W.2d 794 (Tex. 1992), that the "express negligence" test applies only to indemnity promises denominated as such. (R 1081-78). The Texas Supreme Court said that a promise to name a party as an additional insured is not subject to the "express negligence" test even though this might allow parties to accomplish

indemnity under another name. Getty v. Insurance Co. of North America, 845 S.W.2d 794, 803 (Tex. 1992). Amoco made the argument presented in sub-section IVB of this brief, infra, that the Amoco-Woodson agreement contained a reimbursement covenant as well as an indemnity covenant, and that under Getty, the reimbursement provision should not be subject to the "express negligence" test. (R 1081-75). The District Court denied Amoco's motion. (R 1089-85).

Finally, Amoco filed a Rule 60(b) motion seeking relief from its stipulation of partial fault. (R 1123-1097). Amoco understood the trial court's final ruling to be that under Ethyl, even a partially negligent indemnitee can enforce only those agreements that meet the "express negligence" test. Amoco acknowledges that Ethyl can be read as so holding. However, that ruling was fatally inconsistent with the trial court's earlier statement that the dispositive issue was Woodson's negligence, which would be totally irrelevant under the trial court's ultimate ruling. Amoco argued that its stipulation was based on its reasonable reliance on the trial court's initial ruling, and that if the trial court were going to amend that ruling, Amoco should be allowed to withdraw the stipulation. (R 1117-16).

The trial court denied Amoco's motion for relief from the order. (R 1151), and Amoco filed a separate notice of appeal from that denial. (R 1158-57). All appeals were consolidated.

IV.

ARGUMENTS

A. The Texas Supreme Court has modified the "express negligence" rule, and this Court should remand the case for fact-finding consistent with the modified rule.

After all notices of appeal had been filed in this matter, the Texas Supreme Court revisited the question of indemnities in the case of Page Petroleum, Inc. v. Dresser Industries, inc., 36 Tex. S.Ct. J. 737 (April 7, 1993). The principal issue in that case was whether, in addition to meeting the "express negligence" test, an indemnity agreement also had to be conspicuous. Here is what the Texas Supreme Court said:

> Because indemnification of a party for its own negligence is an extraordinary shifting of risk, this Court has developed fair notice requirements which apply to those types of agreements. The fair notice requirements include the express negligence doctrine and the conspicuousness requirement.

Id., at 739. As this statement show, the Texas Supreme Court determined that indemnity agreements relieving the indemnitee of its own negligence must meet the requirement of fair notice, which requirement contains two components--the express negligence doctrine established in Ethyl and a conspicuousness requirement.

The statement that is of operative significance for this case came in a footnote to the portion of text previously

quoted. The court said:

> The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement. Seegenerally Cate v. Dover Corp.,790 S.W.2d 559, 561 (Tex. 1990).

Page, supra, 36 Tex. S.Ct. J. at 739 & n.2. In that unmistakable language, the Texas Supreme Court said that the fair notice requirements, (note the use of the plural), which include the express negligence doctrine, do not apply where the indemnitee had actual notice or knowledge of the indemnity agreement.

The statement that the fair notice requirements do not apply where the indemnitor had "actual notice or knowledge" was a departure from prior law. In Ethyl, the Texas Supreme Court had specifically stated that "the intent of the parties must be specifically stated within the four corners of the contract." Ethyl corp. v. Daniel Construction Co., 725 S.W.2d 705, 708 (Tex. 1987). That statement, focusing as it did solely on the contents of the document, apparently made the parties' knowledge or notice of the indemnity provision irrelevant. Indeed, we find no post-Ethyl case passing on the validity of an indemnity agreement that considers anything other than the wording of the indemnity provision, and virtually all of those cases were decided one way or another on motions for summary judgment. See generally Monsanto Co. v. Owens-Corning Fiberglas, 764 S.W.2d 293, 296 (Tex. App.--Houston [1st Dist.] 1988) (validity of indemnity provision never a fact issue because if contract is ambiguous, Ethyl declares the contract unenforceable).

The significance of the Supreme Court's statement that "actual notice or knowledge" ousts the fair-notice requirements is best appreciated by reading the case to which

the Supreme Court cited, the 1990 case of Cate v. Dover corp., 790 S.W.2d 559, 561 (Tex. 1990). That was not an indemnity case at all, but rather, dealt with the problem of when a disclaimer of implied warranties is effective. The Court said that a disclaimer had to be "conspicuous," but it went on to say the following:

> Dover argues that even an inconspicuous disclaimer should begiven effect because Cate hadactual knowledge of it at the time of the purchase. Because the object of the conspicuousness requirementis to protect the buyer from surprise and an unknowing waiver of his or her rights,inconspicuous language isimmaterial when the buyer has actual knowledge of the disclaimer. This knowledge can result from the buyer's prior dealings with the seller, or by the seller specifically bringing the inconspicuous waiver [sic.] to the buyer's attention.

Id. at 561. Having so observed, the Supreme Court held that the party seeking to enforce an inconspicuous disclaimer by summary judgment had the burden of proving actual knowledge on the part of the claimant.

By introducing the "actual notice or knowledge" exception to the express negligence doctrine, the Texas Supreme Court has declared that a party in the position of Woodson may make a prima facie case for avoiding an indemnity agreement by showing a lack of fair notice, meaning either that the express negligence test or the conspicuousness test was not met. As the new Page case holds, "compliance with both of the fair notice requirements is a question of law for the court." 36 Tex. S.Ct. J. at 740. However, even where that showing is made, the party

seeking indemnity can still prevail by showing that the indemnitor had "actual notice or knowledge" of the indemnity provision. And as the Cate case suggests, the determination concerning actual notice or knowledge will seldom be a summary judgment issue.

It is a basic principle of law that "a federal appellate court will apply the law in effect at the time of its decision," and that the normal rules of waiver do not apply. Carroll v. General Accident Ins. Co. of America, 891 F.2d 1174, 1175 & n.1 (5th Cir. 1990). This principle applies with particular force in diversity cases, where the United States Supreme Court has specifically directed federal appellate courts to apply state law as of the time of appeal, even if doing so would mean reversing a decision that was clearly correct when made. Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S.Ct. 347, 81 L.Ed. 327 (1941). Since Vandenbark, "it is the practice of this court to remand an issue to the trial court when there is a change in relevant state law during the pendency of an appeal." Moorhead v. Mitsubishi Aircraft International, Inc., 828 F.2d 278, 289 (5th Cir. 1987).[2]

Amoco submits that in light of the new Page decision, this case should be remanded to give the District Court the opportunity to determine whether Woodson did or did not have "actual notice or knowledge" of the indemnity agreement. That small portion of Woodson's deposition contained in the record, quoted previously, strongly suggests

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[2] If remand is ever inappropriate, it would be in those few instances where the state court would not apply its own decision retroactively. *Moorhead v. Mitsubishi Aircraft International, Inc.*, 828 F.2d 278 (5th Cir. 1987). But as this Court has previously observed, when the Texas Supreme Court intends that a decision should apply prospectively only, it makes that intention explicit. *Downs v. J.H. Huber Corp.*, 580 F 2d. 794, 796 (5th Cir. 1978). Nothing in the *Page* decision suggests that it is to be applied prospectively only.

that Woodson did have knowledge or notice, and certainly shows that this remand request is not a mere "shot in the dark." To the contrary, Amoco submits that a decision to the effect that Woodson did have "actual notice or knowledge" is virtually a foregone conclusion. Amoco recognizes, though, that because a finding of fact will be involved, the fact ought to be found by the District Court in the first instance.

B. **Alternatively, this Court should declare that the Amoco-Woodson agreement contains aseparate and independent promise that is enforceablenotwithstanding the limitations placed on indemnity agreement.**

Amoco's claim is based on Section X of the Amoco-Woodson contract of July 2, 1987, which says, in pertinent part:

> The Contractor (Woodson) shall indemnify and save Company (Amoco) harmless from andagainst any and all losses . . . caused by or resulting from the negligence of the Contractor . . . or from poor, improper or unworkmanlike performance . . . and the Contractor agrees to reimburse Company for all sums which Company may pay . . . in settlement of any claim on account thereof . .

(emphasis added). The critical point is that the contract contains two separate provisions. One provision states that Woodson will indemnify Amoco for losses caused by Woodson. The second provision states that Woodson will reimburse Amoco for sums Amoco spends to settle claims

"on account thereof," which refers back to Woodson's "negligence" or its "improper or unworkmanlike performance."

In late 1992, the Texas Supreme Court case held that provisions that are separate and independent from an indemnity agreement are not subject to Ethyl. In Getty v. Insurance Co. of North America, 845 S.W.2d 794 (Tex. 1992), the Supreme Court held that a promise to name another party as an additional insured was enforceable without meeting the requirements of Ethyl. The Court said, "We decline to extend the express negligence doctrine (of Ethyl) to contractual provisions other than indemnity agreements . . . " Id. at 806.

The rule that the express negligence doctrine applies only to indemnity agreements has application to this case. As Woodson argued below, indemnity is a situation where, by contract, one party agrees to absorb the consequences of an accident irrespective of fault. Here, however, the contract also contains a promise by Woodson to reimburse Amoco to the extent of Woodson's fault. Thus, the reimbursement promise is separate from and narrower in scope than the indemnity promise. Under the Getty rule, the reimbursement provision should be enforceable apart from the indemnity provision.

In Getty, the party seeking to avoid its obligations argued that "recognizing a distinction between the indemnity and insurance provisions would allow Getty to accomplish indirectly what it could not achieve directly: avoiding liability for its own negligence." Id. at 803. The Supreme Court agreed that the argument might be accurate, but said that in the absence of the explicit statutory and case-law prohibitions that apply to indemnity agreements, the freedom of the parties to contract freely outweighed such considerations. Id. at 805.

For the foregoing reasons, the District Court erred when it refused to enforce the reimbursement provision of

the Amoco-Woodson contract. That provision is enforceable despite the express negligence doctrine. This Court should therefore reverse and render judgment for Amoco to the extent of Woodson's negligence.

C. The District Court abused its descretion by failing to allow Amoco to withdraw its stipulation concerning apportionment of fault.

Finally, Amoco would urge that if this Court denies all other relief, it permit Amoco to withdraw its stipulation concerning its percentage of fault. As set forth previously, Amoco entered into that stipulation in reliance on the trial court's ruling that the dispositive face issue in the case was Woodson's negligence. Nothing whatever was said in the initial rulings about Amoco's negligence.

Yet when the trial court entered its final judgment, the situation was completely reversed. The final judgment, based on a reading of the Ethyl case, declared that Amoco could not recover because it was partially at fault. Under Ethyl, Woodson's negligence or lack thereof is totally immaterial, and the sole significant issue would be Amoco's negligence.

Amoco submits that the explanation for all of this is very simple--the trial court changed its mind. Amoco does not question the right of a trial court to change an interlocutory ruling. However, where, as here, the parties have detrimentally relied on the interlocutory ruling, and have entered into a stipulation in reliance on that ruling, it is fundamentally unfair for the trial court to change its mind but prohibit the litigants from retracting their stipulations.

Amoco submits that in this unusual situation, the trial court abused its discretion by failing to allow Amoco to withdraw its stipulation regarding apportionment of negligence. Should this Court grant Amoco either or both of the other remedies that it seeks, then this question becomes

moot. But should the Court not grant any such relief, Amoco would earnestly request this Court to very seriously consider remanding the case with instructions that the trial court vacate the judgment and allow Amoco to withdraw its stipulations.

V.

SUMMARY AND CONCLUSION

Amoco, sued by three Woodson employees, sought indemnity under its contract with Woodson. After the parties stipulated that Amoco and Woodson were equally at fault, the trial court denied Amoco any recovery based on the case of Ethyl Corp. v. Daniel, 725 S.W.2d 705, which said that Indemnity provisions were valid only if they met the "express negligence" doctrine, which the provision at issue did not do.

After the trial court entered judgment and the notices of appeal had been filed, the Texas Supreme Court handed down the case of Page Petroleum Inc. v. Dresser Industries, Inc., 36 Tex. S.Ct. J. 737, 739 & n.2, in which it held that the express negligence doctrine does not apply where "the indemnitor possessed actual notice or knowledge of the indemnity agreement." Consistent with this Court's usual practice, Amoco asks this Court to remand the matter for trial court fact-finding on whether Dresser had such "actual notice or knowledge," thus making the indemnity agreement enforceable notwithstanding Ethyl.

Alternatively, Amoco would show that in the contract, Woodson promised not only to indemnify Amoco, but also to reimburse Amoco for costs arising out of Woodson's negligence. Amoco would submit that the reimbursement covenant is separate from and independent of the indemnity agreement, and is therefore enforceable despite Ethyl on the authority of Getty v. Insurance Co. of North America, 845 S.W.2d 794 (Tex. 1992). Amoco therefore asks this Court to reverse the trial court's judgment and render judgment that Amoco may recover 50% of its losses from Woodson on the

basis of Woodson's 50% negligence.

Finally and in the alternative, Amoco would ask this Court to take note of the fundamental unfairness that resulted from the trial court's apparent change of mind about the applicable law. In reliance on the court's initial statements, Amoco entered into the stipulation concerning apportionment of fault. While the trial court is entitled to change its mind, Amoco should likewise have been entitled to change its position accordingly. Under the circumstances, Amoco would urge that prohibiting the withdrawal of Amoco's stipulations rose to the level of an abuse of discretion. Should this Court deny Amoco any other relief, Amoco would ask this Court to remand the case with an order that the trial court vacate the judgment, permit Amoco to withdraw the stipulations, then proceed with this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies the forgoing BRIEF FOR DEFENDANT-THIRD PARTY PLAINTIFF-APPELLANT AMOCO PIPELINE COMPANY were sent via hand delivery to:

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on this 6th day of July, 1993.

/s/
John F. Waldo

APPENDIX AD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-2138
ROBERT LEE HAMILTON, ET AL
Plaintiffs

VS.

AMOCO PIPELINE COMPANY
Defendant-Third Party
Plaintiff-Appellant

VS.

WOODSON CONSTRUCTION COMPANY
Third Party Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DISTRICT

BRIEF FOR THIRD PARTY DEFENDANT-APPELLEE
WOODSON CONSTRUCTION COMPANY

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CERTIFICATE OF INTERESTED PARTIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO.93-2138
ROBERT LEE HAMILTON, ET AL.,
Plaintiffs,
VS.
AMOCO PIPELINE COMPANY
Defendant-Third Party
Plaintiff-Appellant
VS.

WOODSON CONSTRUCTION COMPANY
Third Party Defentant-Appellee

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Parties: Amoco Pipeline Company
Defendent-Third Party Plaintiff-Appellant
Woodson Construction Company
Third Party Defendant-Appellant

Counsel: Edward J. Murphy
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Insurer: Liberty Mutual Insurance Company
(Woodson's insurer)

Vesta Insurance Company
(Amoco's insurer)

BINGHAM & MANN
Houston, Texas

Note - The named plaintiffs, Robert Lee Hamilton et al., have received settlements from Amoco Pipeline Company and/or its insurers, and are therefore not persons interested in the outcome of this appeal despite their nominal status as parties.

STATEMENT REGARDING ORAL ARGUMENT

Appelle, Woodson Construction Companuy, requests that oral argument be denied, and requests argument only in the event this case is set for oral argument.This is a simple case involving the construction of an indemnity agreement. This Court can read the Texas Supreme Court Case, relied on by Appellant, to determine its significance to this case. All other issues have been fully argued in the record and in the appellate briefs.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-2138
ROBERT LEE HAMILTON, ET AL.,
Plaintiffs

VS.

AMOCO PIPELINE COMPANY
Defendant-Third Party
Plaintiff-Appellant

VS.

WOODSON CONSTRUCTION COMPANY
Third Party Defendant-Appellee

INTRODUCTION

Third-Party Defendant/Appellee Woodson Construction Company ("Woodson")s submits this brief in response to the brief filed by Third-Party Plaintiff/Appellant Amoco Pipeline Company ("Amoco"). Amoco is appealing the granting of a final judgment for Woodson and the denial of its motion for relief from judgment by the United States District Court for the Southern District of Texas, Houston , Division, the Honorable David Hittner, presiding.

STATEMENT OF THE ISSUES

Issue No. 1 (Amoco's Issue No. 1 Restated

Under Texas law, the intent to indemnify another must be expressed in the instrument in specific terms. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d. 705, 707 (1987) ("*Ethyl*"). If that intent is expressly stated and is conspicuous in the document, the indemnitor has fair notice of his obligation. *Goodyear Tire & Rubber V. Jefferson Constr.*, 565 S.W.2d. 916, 919 (Tex. 1978), *overruled on other grounds*, 36 Tex. S. Ct.J. 737. A recent Texas Supreme Court case, *Page Petroleum, Inc. V. Dresser Indus., Inc.*, 36 Tex. S. Ct. J. 737 (April 7, 1993), (*Page*") held that compliance with fair notice requirements is a question of law, rather than a question of fact. In a footnote, however, the court stated that "[t]he fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement."

1. Whether under the *Page* opinion, this Court should remand this case for a fact-finding of Woodson's "actual notice and knowledge" of the indemnity agreement.

Issue No. 2 (Amoco's Issue No. 2 Restated)

Amoca seeks contractual indemnity for Woodson's (the indemnitor's) negligence based on a provision in the Woodson/Amoco construction contract. The parties later stipulated that each were 50% at fault for the underlying injuries.

2. Whether this Court should hold that the Amoco-Woodson contract contains a separate and independent agreement apart from the indemnity agreement that would allow Amoco ot be reimbursed by Woodson for Woodson's proportional negligence?

Issue No. 3 (Amoco's Issue No. 3 Restated)

The district court denied Woodson's motion for summary judgment because there was a material fact question of the amount of Woodson's negligence that proximately caused the underlying injuries. After the district court entered judgment for Woodson, Amoco filed for relief from this judgment and permission to withdraw its stipulation of liability claiming mutual mistake. The court denied this motion.

3. Whether the trial court abused its discretion in denying Amoco's Rule 60(b) motion and request to withdraw its stipulation of 50% liability.

STATEMENT OF THE CASE

A. Course of Proceedings and disposition in the Court Below

Three Woodson employees sued Amoco for personal injuries sustained during a construction project on Amoco's right-of-way. One of the injured, Robert Hamilton ("Hamilton"), sued Amoco for negligence in this action (R.VII, 10). Two others , Raymond Frederick ("Frederick") and Arthur Thomas ("Thomas"), sued Amoco in separate actions (R.II, 1047). Woodson, as a subscriber to the Worker's Compensation Act, was immune from suit (R. II, 1048, 1047), but intervened in the Hamilton suit for damage to its equipment (R. VI, 218). Amoco then filed a cross-claim against Woodson seeking contractual indemnity or contribution (R. IV, 685). Subsequently, Amoco settled the underlying claims (R. II, 1047).

Woodson moved for summary judgment, alleging that Amoco was not entitled to either indemnity or contribution.

(R. IV, 624). The district court denied that motion. (R. III, 892). At the request of the parties, the court declared

Woodson's motion because there was a material fact question as to the amount of Woodson's negligence. (R.II, 980).

Amoco and Woodson then stipulated that each was 50% at fault for the underlying injuries (R. II, 1048), and both parties moved for judgment (R. II, 1042, 1029). The district court adopted the parties' stipulations of fact, and entered judgment for Woodson, concluding that Amoco was not entitled to indemnity nor contribution from Woodson (R. II, 1045).

Amoco filed a motion for new trial or to alter or amend the judgment (R.II, 1053), which was denied by the district court (R. I, 1089). Amoco then filed a notice of appeal from this order (R. I, 1143).

Subsequently, Amoco filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(1) and (3), alleging mutual mistake (R. I, 1123). The court also denied this motion and reaffirmed the judgment for Woodson (R. I, 1151). On March 3, 1993, the court again entered final judgment in Woodson's favor (R. I,1155). Amoco then filed two notices of appeal (R> I,1158, 1161), and requested that the appeals be consolidated (R. I,1161).

B. Statement of Facts

Woodson was under contract to Amoco to install a new pipeline on Amoco's right-of-way near Kemah, Galveston County, Texas. On or about September 9, 1987, three of Woodson's employees, Hamilton, Frederick, and Thomas, were injured when the pipeline exploded and burned. All three men sued Amoco in separate suits, alleging

that their injuries resulted from Amoco's negligence. This case stems from the suit filed by Hamilton (R. VII, 10).

As a subscriber to the Texas Worker's Compensation Act, Woodson was immune from suit, and Hamilton, Frederick, and Thomas each received worker's compensation benefits from Woodson's worker's compensation carrier (R. II, 1048). Amoco later settled with the three plaintiffs for a total sum of $6,025,000, and received a full and complete release from each (R. II, 1047).

Woodson intervened in Hamilton's suit against Amoco to recover for equipment damaged in the pipeline fire (R. VI, 218). Amoco then filed a cross-action against Woodson (R. II, 685), alleging that Amoco was entitled to contractual indemnity or contribution for that portion of Woodson's negligence that was a proximate cause of the underlying injuries (R. IV, 682). Amoco's claims are based on the following provision in the Woodson/Amoco construction contract:

> The Contractor shall indemnify and save Company harmless from and against any and all losses, claims, demands, liabilities, suits or actions (including all reasonable expenses and attorney's fees) for injuries to or the death of any person or persons, including the employees of each party hereto and the employees of their subcontractors, or for loss of or damage to the property of any person or persons, including the property of Company, caused by or resulting from the negligence of the Contractor or any of its subcontractors or the employees of either, or from poor, improper or unworkmanlike performance of any of the work to be performed hereunder,

> or by materials (except such as Company may have furnished) used in said work which are defective, or by reason of any other thing in connection with the performance of this Contract and the Contractor agrees to reimburse Company for all sums which Company may pay or be compelled to pay in settlement of any claim on account thereof, including any claim under the provisions of any worker's compensation law or other similar law, or under any plan for employees' benefits which Company may have or adopt, except that the Contractor assumes no liability for the sole negligent acts of Company, its agents, servants or employees (R. IV 668).

Woodson moved for summary judgment contending that Amoco was not entitled to either contractual indemnity or contribution (R. IV, 624). Woodson first argued that the contract did not provide for contribution and any claim for common law contribution was barred by Woodson's subscription to the Worker's Compensation Act (R. IV, 623, 622). Woodson also argued that Amoco's indemnity claim was invalid because the contractual language did not meet the "express negligence test" as proscribed by the Texas Supreme Court in *Ethyl*. (R. IV, 622-619).

In response to Woodson's motion for summary judgment, Amoco argued that the express negligence test did not apply in this case because Amoco was seeking indemnity, not for its own negligence, but for Woodson's negligence (R. III, 764). The district court denied Woodson's motion for summary judgment (R. III, 892). Pursuant to a request by both parties, the court stated that it denied the summary judgment because there was a material fact question of what percentage of the plaintiff's injuries was caused by Woodson's negligence (R. II, 980).

Woodson and Amoco then entered into stipulations of fact (R. II, 1048), wherein they agreed that each was 50% negligent for the underlying injuries (R. II, 1047). After the stipulations of fact were filed with the district court, each side moved for judgment (R. II, 1042, 1029). In its motion, Woodson contended that it should prevail because (1) the intent of indemnification is to reimburse the indemnitee [Amoco] for its own negligence and not for the indemnitor's [Woodson's] negligence; (2) the contract did not expressly provide for comparative negligence in accordance with the express negligence rule; and (3) Amoco had no contractual, common law, or statutory right to contribution (R. II, 1042). Amoco moved for judgment, without argument, based solely on the stipulations of fact filed with the court (R. II, 1029). After considering both motions, the district court entered a take-nothing judgment in Woodson's favor, concluding that Amoco could not recover under either an indemnity or contribution theory (R. II, 1045).

Amoco then filed a motion for new trial or to alter or amend the judgment (R. II, 1053), maintaining that the court's holding was "diametrically opposed" to the court's prior ruling that there was a material fact issue as to the amount of Woodson's negligence (R. II, 1052). Woodson responded that the court's prior ruling is consistent with the argument that Amoco could recover only if Woodson were 100% at fault (R. II, 1070). Subsequently, Amoco filed a brief contending that the contractual language in issue contains both an indemnity provision and a "reimbursement" provision that is not subject to the *Ethyl* test (R.II 1082-80). The district court denied Amoco's motion (R. I, 1089) and stated that Amoco had apparently confused the terms reimbursement and contribution and that "the reimbursement provision in the contract between Amoco and Woodson does not provide an independent basis for recovery" (R. I, 1087). Amoco then filed a notice of appeal. (R. I, 1143)

Amoco next filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(1) and (3), seeking to withdraw its stipulation of 50% negligence (R. I, 1123). Amoco claimed that both parties mistakenly interpreted the district court's denial of Woodson's motion for summary judgment as an implied holding that Amoco was entitled to judgment (R. I, 1116).

In its response (R. I, 1141, Woodson presented evidence that, contrary to Amoco's allegations, it did not enter into the stipulations based on a belief that Amoco was entitled to judgment and that it made no misrepresentations to induce Amoco to enter into the stipulations (R. I, 1132, 1131). The district court denied Amoco's motion for relief from judgment (R. I, 1151), and entered a final judgment in Woodson's favor (R. I, 1155). Amoco then filed another notice of appeal (R. I, 1158), as well as a protective notice of appeal requesting that all three notices of appeal be consolidated (R. I. 1161).

SUMMARY OF THE ARGUMENTS

Amoco's recovery in this case depends on the answer to one question: Is Amoco entitled under the Woodson/Amoco contract to be reimbursed for monies it paid in settlement for that portion of Woodson's negligence that proximately caused the underlying injuries. Under both the contract and the law, the answer is NO.

Amoco claims that it is entitled to contractual indemnification, and has abandoned any claim for contribution, contractual or otherwise (R. XI, 3, 4).[1] Also, the contract provision, under which Amoco seeks recovery, is one for indemnification, not contribution. Therefore, Amoco can prevail on appeal only if it establishes that it is entitled to indemnification.

However, Amoco's claim for reimbursement for Woodson's percentage of negligence, is actually a request for contribution, not indemnity. Indemnification is the shifting of the burden of paying the plaintiff for the indemnitee's negligence from the indemnitee to the indemnitor. *See General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977). Here, however, Amoco is not asking to be reimbursed for its own negligence, but is seeking "indemnity" for Woodson's negligence. In other words, Amoco is seeking an apportionment of the settlement amount, which is a claim for contribution, not indemnification, However, as noted above, Amoco has waived any claim to contribution (R. XI, 3, 4); but even if it has not waived this claim, the contractual provision at issue here is clearly one for indemnity, not contribution.

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[1] Moreover, Amoco, by settling the suit, is not otherwise entitled to contribution. *Beech Aircraft Corp. v. Jenkins*, 739 S.W.2d 19 (Tex. 1987).

Furthermore, the indemnity provision does not meet the express negligence test and provide for comparative indemnity or for contribution for each parties' proportionate negligence. Amoco admits that the indemnity clause does not satisfy *Ethyl*, but seeks to avoid that requirement by contending that a footnote in a recent Texas Supreme Court opinion holds that the fair notice requirements of an indemnity agreement, which include the express negligence doctrine, are no longer applicable if the indemnitor has "actual notice or knowledge" or the indemnity agreement. However, Woodson's notice or knowledge of the indemnity provision is totally irrelevant in this case because, as stated above, Amoco is not entitled to either indemnity or contribution under the contract or under the law. Also, the extent of Woodson's notice and knowledge of the indemnity agreement has already been established, therefore, any remand would be uncalled for. In addition, Amoco's reliance on *Page* is misplaced because the *Page* court did not overrule *Ethyl*, but rather held that compliance with the fair notice requirements is a question of law and not of fact. The footnote clearly applies to the conspicuity of an indemnity agreement, and not the express negligence rule.

Amoco also argues that there is a separate provision in the indemnity clause that provides for reimbursement. However, it is clear that when the entire provision is harmonized and given effect, there is no agreement, separate and apart from the indemnity language, that expressly provides for either comparative indemnity or contribution. Furthermore, Amoco's recovery is limited to its indemnification claim because, as the district court noted in its order of December 23, 1992, "'[r]eimbursement' is not an independent legal theory under which Amoco may recover the settlement amount representing Woodson's proportionate liability" (R. I, 1087).

Lastly, Amoco should not be allowed to withdraw its stipulation of liability. At best, only Amoco was mistaken as to the meaning of the court's denial of Woodson's summary judgment; therefore, there is no need for "extraordinary judicial relief." Moreover, any remand would not be "in the interests of justice" because Amoco never claimed that it was totally without fault in this matter.

ARGUMENTS AND AUTHORITIES

I.

This Court should not remand this case for fact findings because Woodson's "actual notice and knowledge" of the indemnity agreement is irrelevant to Amoco's recovery. (In response to Amoco's Issue No. 1, Amoco's brief pp. 13-17)

A. Standard of Review

This Court reviews the district court's application of State law de novo. *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991), *reh'g denied*. Also, the issue of whether this Court should remand this case to the district court for fact-finding is a question of law for the appellate court. *See Harper & Row Publishers, Inc. v. Nation Enter.*, 409 U.S. 826, *reh'g denied*, 110 S.Ct. 12, 106.

B. Amoco's position

The district court held that Amoco could not prevail on its indemnity claim because the provision at question "does not meet the express negligence test because it specifically provides for indemnity only in the case of Woodson's negligence" [Conclusion of law No. 5, emphasis by the court] (R. II, 1044). The court further held that Amoco was not entitled to comparative indemnity for Woodson's proportional negligence because "the contract does not contain a provision for contractual comparative indemnity" [Conclusion of law No. 6] (R. II, 1044). In short, the district court held that Amoco could not prevail because (1) the contract is for indemnity, not contribution, and (2) the obligation to indemnify is not enforceable because it does not meet the express negligence test.

Amoco does not complain on appeal of these holdings. In fact, Amoco has conceded throughout this case that the intent of the provision is to provide for indemnification but that the provision does not met the express negligence test. Amoco argued, however, that *Ethyl* does not apply in this situation because Amoco is seeking indemnification for the indemnitor's [Woodson's] negligence, and not for the indemnitee's [Amoco's] negligence (R. III, 764)

On appeal, Amoco takes a totally new approach and contends that a statement in a footnote of *Page*, 36 Tex. S. Ct. J. at 737, a recent Texas Supreme Court case, holds that where the provision does not meet the express negligence test, the indemnitee "can still prevail by showing that the indemnitor had 'actual notice or knowledge' of the indemnity provision." (Amoco's brief, p. 15.) Amoco then asks this court to remand the case to the district court for fact findings of Woodson's "actual notice and knowledge" of the indemnity agreement.

C. Woodson's notice or knowledge is irrelevant

Whether or not there is a fact question as to Woodson's notice or knowledge of the indemnity clause is totally irrelevant because Amoco is not entitled to "indemnity" for Woodson's partial negligence under the law or under the contract. Furthermore, as noted by Amoco on p. 10 of its brief, the extent of Woodson's notice and knowledge of the indemnity clause already appears in the record (R. I, 1073-71). Thus, any remand for a fact finding would be a useless act.

1. <u>Amoco seeks contribution under an indemnity provision.</u>

Amoco sued Woodson seeking contractual indemnity or contribution for that portion of Woodson's negligence that was a proximate cause of the Plaintiffs' injuries based on an indemnity provision in the construction contract. Amoco contends that this provision provides that Amoco, as indemnitee, is entitled to be reimbursed by Woodson, the indemnitor, for Woodson's partial negligence. Under indemnity principles, however, an indemnitee seeks relief for all or a portion of its own negligence, and not for some portion of the indemnitor's negligence. *See General Motors Corp. v. Simmons*, 558 S.W.2d at 859. On the other hand, contribution requires that each tortfeasor pay for its own negligence conduct. *Id.* Therefore, Amoco's request that Woodson pay for Woodson's own negligence, is a claim for contribution, not indemnity. However, as noted previously, Amoco has waived any claim to contribution, contractual or otherwise (R. XI, 3, 4). Moreover, even if Amoco has not waived its contribution claim, the contract contains no provision for contribution, must less an enforceable provision, and therefore, simply does not entitle Amoco to the relief it seeks.

Amoco's claim under the indemnity clause is based on its misunderstanding of the principles of indemnity and contribution. Indemnity and contribution are similar but distinguishable concepts. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992). The two concepts "are similar in that each designates a legal theory under which one may recover money, paid by him to an injured plaintiff, from another who is also legally liable for the plaintiff's injuries." *W. R. Grace v. Scotch Corp., Inc.*, 753 S.W.2d 743, 747, n. 3 (Tex. App.--Austin 1988, writ denied). Because of the similarity between "indemnity" and "contribution," many courts have used the terms as synonyms, which has caused a great deal of confusion in interpreting their opinions. *Id.*

One primary difference between the two theories is the amount that is recoverable under one theory as compared to the other. **Id.** An indemnity agreement is designed to allow one tortfeasor to shift all the loss onto another tortfeasor "provided the latter should appropriately answer for the entirely of the loss." *Hardy v. Gulf Oil Corp.*, 949 F.2d at 829-30. Therefore, "'indemnity' contemplates the payment of all of plaintiff's damages by one tortfeasor to another tortfeasor who has paid it to the plaintiff." *General Motors v. Simmons*, 558 S.W.2d at 859. Accordingly, where both the indemnitor and indemnitee are jointly negligent for the underlying injuries and the contract expressly provides indemnity for concurrent negligence, the indemnitor pays for its own partial negligence as well as the indemnitee's partial negligence. *See e.g., Dupont v. TXO Prod. Corp.*, 663 F. Supp. 56 (E.D.Tex. 1987); *Gulf Oil Corp. v. Ford, Bacon & Davis*, 782 S.W.2d 28 (Tex. App. -- Beaumont 1989, no writ).

In contrast, "contribution" requires that each tortfeasor pay its "proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate share." *General Motors v. Simmons*, 558 S.W.2d at 859. In other words, each tortfeasor pays for its own share of negligent conduct. One party does not assume the burden of paying for both parties as does an indemnitor under a valid indemnity contract.

It is clear, therefore, that Amoco is not asserting a contractual indemnity claim because it is not asking to be reimbursed for its <u>own</u> conduct, but for Woodson's conduct.

2. <u>The express negligence test applies to indemnity contracts</u>.

The "express negligence doctrine" is a rule of

contract construction that applies to all indemnity agreements. *Ethyl*, 725 S.W.2d at 708. Therefore, indemnitees who seek indemnification for the consequences of their *own* negligence that proximately causes injury jointly and concurrently with the indemnitor's negligence must expressly state that intention. *Aerospatiale Helicopter v. Universal Health*, 778 S.W.2d 492 (Tex. App.--Dallas 1989), *writ denied*, 111 S.Ct. 149. Otherwise, the contract is construed, as a matter of law, against indemnification. *See Monsanto Co. v. Owens Corning Fiberglas Corp.*, 764 S.W. 2d 293, 296 (Tex. App. Houston [1st Dist.] 1988, no writ). Accordingly, even if the law is construed to allow an indemnitee recovery for the indemnitor's partial negligence, as urged here, the express negligence test should still apply. Because the provision in question does not meet the express negligence test, it must be construed against indemnification. *Ethyl*, 725 S.W.2d at 707.

3. Amoco has misconstrued the *Page* opinion.

Amoco's reliance on *Page* is totally misplaced. the *Page* court addressed the conspicuousness of a release agreement. After determining that the agreement in question was a "release" rather than an "indemnity agreement," the court held that the "fair notice requirement" apply to releases as well as to indemnity agreements. *Page*, 36 Tex. S. Ct. J. at 739. The court then overruled *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916 (Tex. 1978) ("*Goodyear*"), and held tht the fair notice requirements, which include both the express negligence test and the conspicuousness requirement, are questions of law, not of fact. Because the release in question was not conspicuous, the court determined that it did not meet the fair notice requirements. *Page*, 36 Tex. S. Ct. J. at 740.

Clearly, the *Page* court was concerned with the conspicuity requirement of the fair notice provisions, which prior to this time, had been a fact issue under *Goodyear*. As Amoco ackowledges, the footnote in *Page* references the court's prior holding in *Cate v. Dover Corp.*, 790 S.W.2d 559 (Tex. 1990) ("*Cate*"), which involved a warranty disclaimer. In both *Goodyear* and *Cate*, the only relevant issue was conspicuity. Therefore, the only logical interpretation of the footnote is that the fair notice requirements are met if: (1) the provision meets the "express negligence test" and (2) either (a) the clause is conspicuous or (b) the indemnitee shows that the indemnitor has actual knowledge of his obligation. Thus, to the extent the *Page* acknowledges an exception to the fair notice requirements, it does so only in regards to the requirement of conspicuity. Surely, if the court had meant to overrule the established, black letter law of *Ethyl*, it would have done so in the body of the opinion, rather than in a footnote.

Furthermore, the *Page* court's holding that compliance with the fair notice requirements is a question of law reaffirms, rather than overrules, *Ethyl*. Generally, the interpretation of an ambiguous contract involves a fact question. *Monsanto Co. v. Owens-Corning Fiberglas Corp.*, 764 S.W.2d at 296. *Ethyl*, however, provides that when an indemnity contract is ambiguous because the intent to indemnify is not expressly stated, the contract is construed against indemnification and no fact issue arises. *Monsanto Co. v. Owens-Corning Fiberglas Corp.*, 764 S.W.2d at 296. Therefore, *Page*, by overruling *Goodyear*, held that the conspicuous requirement, as well as the *Ethyl* rule, are both questions of law.

II.

The indemnity provision cannot be construed as containing a separate and independent agreement apart from the indemnification agreement. (In reply to Amoco's Issue No. 2, Amoco's brief pp. 17-19)

A. Standard of Review:

The determination of whether a contract is ambiguous is a question of law, which this Court reviews de novo. *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, *cert. denied*, 112 S.Ct. 873.

B. Amoco's Position:

Prior to judgment, Amoco never asserted that the contractual provision in question was anything other than an indemnity clause. However, in its brief in support of its motion to enter judgment, filed after judgment was entered and prior to the denial of its motion for new trial, Amoco urged that the indemnity clause contained a "reimbursement" provision that was separate and apart from the indemnity language (R.II, 1080).

C. The indemnity provision contains no separate agreement.

Amoco sued Woodson for contractual indemnity or contribution, but later abandoned any claim for contribution. (R. XI, 3, 4)[2] Therefore, Amoco's recovery must be based

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[2] Moreover, Amoco, as a settling tortfeasor, cannot seek contribution from Woodson, as a non-settling tortfeasor. *Beech Aircraft Corp. v. Jenkins*, 739 S.W.2d at 22. Also, absent a contractual

on a contractual indemnity theory because, as noted by the district court in its order of December 23, 1992, "'reimbursement' is not an independent legal theory under which Amoco may recover...." (R. I, 1087).

In construing any contract, including an indemnity contract, the primary concern of the court is to determine the true intent of the parties as expressed in the instrument. *Ideal Lease Serv., Inc. v. Amoco Prod. Co.*, 662 S.W.2d 951, 953 (Tex. 1983). Under the express negligence test, this intent must be expressed in specific terms rather than stated ambiguously. *Ethyl*, 725 S.W.2d at 707-08. To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all of the contract provisions so that none will be rendered meaningless. *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 518, 243 S.W.2d 154, 158 (Tex. 1951). No single provision taken alone is controlling; rather, all the provisions must be considered with reference to the whole instrument. *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193, 196 (Tex. 1962).

Using these principles of contract construction, it is clear that while the parties may have attempted to provide for indemnification for Amoco's negligence, they failed. The provision begins with language to the effect that "The Contractor shall **indemnity** and **save** Company **harmless**... (emphasis added), and then states that "the Contractor [Woodson] agrees to reimburse Company [Amoco] for all sums which Company may pay ... in settlement of any claim

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agreement to pay a proportionate share of common liability, Woodson is immune from suit for contribution because the plaintiffs were employees of Woodson and all received worker's compensation benefits. *See* Tex. Rev. Civ. Stat. Ann. Art. 3806, et seq.' *Monsanto Co. v. Owens Corning Fiberglas Corp.*, 764 S.W.2d at 294

on account thereof ...." These two phrases are not separate and distinct agreements, but rather, are parts of the same sentence within the same paragraph, and they merely explain, rather than distinguish, one another. Also, even if the latter phase can be construed as a separate obligation, it is clear that it does not specifically provide that Woodson pay for its proportionate share of the Plaintiffs' damages in the event both Amoco and Woodson were negligent. Therefore, it does not meet the requirements of *Ethyl*.

III.

The District Court properly denied Amoco's Rule 60(b) Motion and refused to allow Amoco to withdraw its stipulation of liability because Amoco did not meet its burden of proof by showing mutual mistake or misrepresentation. (In response to Amoco's issue no. 3, Amoco's brief pp. 19-20)

A. Standard of Review

A Rule 60(b) Motion is addressed to the sound discretion of the district court. Appellate review is limited to determining whether that discretion has been abused. *Burnside v. Eastern Airlines, Inc.*, 519 F.2d 1127, 1128 (5th Cir. 1978).

B. Requisites of a Rule 60(b) Motion

Federal Rule of Civil Procedure 60(b) sets forth the grounds on which a court, in its discretion, can rescind or amend a final judgment or order. The Rule provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party of his legal

> representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence...' (3) fraud..., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged,...' or (6) any other reason justifying relief from he operation of the judgment.

The purpose Rule 60(b) is to serve the ends of justice and preserve the finality of judgments. *Seven Elves, Inc. v. Eskenazi*, 635 F.2d at 401 (5th Cir. 1981). In other words, the Rule should be broadly construed to do "substantial justice," however, final judgments should not "be lightly reopened." *Seven Elves*, 635 at 401.

C. Amoco's Position

Amoco sought relief from judgment based on Rule 60(b)(1) and asked to withdraw the mutual stipulation of liability. Amoco claimed that both parties mistakenly interpreted the district court's denial of Woodson's Motion for Summary Judgment as an implied holding that Amoco was necessarily entitled to recover an amount proportionate to Woodson's negligence, and that, based on this mutual mistake, the parties entered into a Stipulation of liability for the underlying injuries. Amoco also sought relief from the judgment under Rule 60(b)(3) based on "misrepresentations" that Woodson believed that judgment would be entered in Amoco's favor.

D. No showing of mutual mistake or misrepresentation

In response to this motion, Woodson presented evidence to refute Amoco's claims. By affidavit, Woodson's counsel, Mr. Bradley Bingham, testified that Woodson interpreted the prior ruling to mean simply that there was a material fact issue regarding the amount of Woodson's negligence which precluded summary judgment (R. I, 1131). Mr. Bingham further stated that he "was of the opinion that the court could rule in favor or either party," and that he never expressed "a contrary opinion to Amoco's counsel or otherwise intentionally or impliedly mislead Amoco or its counsel to misinterpret this Court's prior rulings" (R. I, 1130).

Furthermore, even if Amoco's counsel was mistaken as to the meaning of the denial of the summary judgment, this is not the type of mistake that would invoke "extraordinary judicial relief" under Rule 60(b). Such relief is unavailable where there is mere "misjudgment or careless failure to evaluate" on the part of counsel, *Chick Kam Choo*, 699 F.2d 693 (5th Cir.), *cert. denied sub nom, Chick Kam Choo v. Esso Oil Co.*, 464 U. S. 826 (1983), or where counsel is ignorant of the law. *Nemaizer v. Baker*, 793 F.2d 58, 62 (2nd Cir. 1986). Also, dissatisfaction in hindsight with an attorney's tactical decisions is not grounds for finding mistake or surprise necessary to justify Rule 60(b) relief. *See United States v. O'Neil*, 709 F.2d 361, 373 (5th Cir. 1983) (*O'Neil*); *Chick Kam Choo*, 699 F.2d at 695.

Here, Amoco contends that it would not have entered into the stipulations but for the district court's action in denying Woodson's summary judgment which led it to believe that it was entitled to judgment. However, an attorney's failure to evaluate carefully the legal consequences of a chosen course of action does not warrant extraordinary relief under Rule 60(b). For example, in *O'Neil*, 709 F.2d at 361, the government misinterpreted an order and failed to

take a timely appeal. The government believed that the order directed separate trials under Fed. R. Civ. P. 42(b), rather than severance under Fed. R. Civ. P. 21. The government's misunderstanding apparently stemmed from it interpretation of term "sever." *O'Neil*, 709 F.2d at 372. The appellate court found that although the government's mistake was made in "good faith," the order was not ambiguous; thus the failure to appeal or to inquire as to its status "amounts to a want of adequate care or ignorance of the rules." *O'Neil*, 709 F.2d at 374, *see also, Nemaizer v. Baker*, 793 F.2d at 62-63 (where counsel's error in not contemplating breadth of stipulation dismissing, with prejudice, state law action was not mistake sufficient to justify relief); *Dal Int'l Trading Co. v. Sword Line, Inc.*, 286 F.2d 523 (2nd Cir. 1961) (where stipulation expunging claim in arrangement proceeding on erroneous belief that such claim was duplication of admiralty suit was not mistake sufficient to reopen proceeding).

As in *O'Neil*, the district court's order overruling Woodson's motion for summary judgment was not ambiguous. The court stated that the motion was denied because there was a material fact question precluding the grant of judgment as a matter of law, to wit: "What percentage, if any, of the injuries suffered by plaintiff Robert Lee Hamilton ("Hamilton") were causes by the negligence of Woodson" (R. II, 979). The court did not state at this time, or at any other, that Amoco was entitled to judgment on its claims. If Amoco's attorney believed that this ruling necessarily implied that Amoco was entitled to judgment and only entered into a stipulation of liability based on that belief, his actions constitute ignorance of the law or other rules of court.

Additionally, Amoco has not shown that, even if it was mistaken by the district court's judgment, it would be in the interest of justice to vacate the judgment. *See Compton*

v. Alton Steamship Co., 608 F.2d 961 (4th Cir. 1979). Even if Amoco had been allowed to withdraw the stipulation, the result would have been the same. At no time has Amoco claimed that it was totally free of negligence. Instead, all its claims have been for reimbursement based on Woodson's percentage of negligence. As shown above, Amoco cannot prevail on either an indemnity or contribution theory to seek reimbursement for Woodson's partial negligence. Therefore, even if a jury found that Amoco was 1% negligent and Amoco was 99% negligent, Amoco could not collect for Woodson's partial negligence under the contract or the law.

CONCLUSION

The trial court properly entered judgment for Woodson. Amoco seeks recovery under a contractual provision that provides for indemnification, not contribution. However, Amoco is not entitled to contractual indemnity for Woodson's proportionate negligence because indemnification indemnifies the indemnitee (Amoco) for its negligence and not vice-versa. Also, as a settling tortfeasor, Amoco is not entitled to recover contribution and has abandoned this claim. Furthermore, as Amoco admits, the contract provision in question does not meet the express negligence test and provide for comparative indemnity or contribution.

Unable to prevail on any claim for indemnity for its own negligence or on a claim for contractual comparative indemnification or contribution, Amoco is attempting to convince this court that a statement in a footnote of *Page*, a recent Texas Supreme Court case, holds that the express negligence test does not apply when the indemnitor has actual notice or knowledge of the indemnity provision. This court should not remand this case for a fact-finding of Woodson's notice and knowledge based on the language of this footnote because, not only is such an alleged holding irrelevant to this action, but *Page* did

not specifically address, must less overrule, the express negligence doctrine.

Amoco's other argument that the indemnity provision contains a separate agreement fails under basic contract construction principles. Furthermore, Amoco's recovery must be based on contractual indemnification because "reimbursement" is not a separate legal theory.

In addition, the district court did not abuse its discretion in denying Amoco relief from judgment under Rule 60(b) due to any alleged mutual mistake of the parties or misrepresentations by Woodson. As the district court concluded in its order of December 23, 1991, "Amoco simply misinterpreted [the] Court's denial of summary judgment, and that is an insufficient basis on which to amend or alter a judgment in conformity with the law." Accordingly, this Court should affirm the judgment of the district court.

Respectfully submitted,

BINGHAM & MANN

/s/ Bradley M. Bingham

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ATTORNEYS FOR THIRD PARTY
DEFENDANT-APPELLEE
WOODSON CONSTRUCTION COMPANY

APPENDIX AE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-2138
ROBERT LEE HAMILTON, ET EL.,
Plaintiffs,
VS.
AMOCO PIPELINE COMPANY
Defendant-Third Party
Plaintiff-Appellant
VS.
WOODSON CONSTRUCTION COMPANY
Third-Party Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

APPELLEE'S SUPPLEMENTAL RECORD EXCERPTS

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Attorneys for Third Party
Defendant-Appellee
Woodson Construction Company

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3. Certificate of service

ORDER OF SEPTEMBER 27, 1991 (R. II, 980, 979)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 30 1991
Jesse E. Clark, Clerk
By Deputy: J. Cody

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON, ET AL.,	§	
Plaintiffs,	§	
V.	§	CIVIL
	§	ACTION
AMOCO PIPELINE COMPANY,	§	H-87-4258
Defendant.	§	

ORDER

Pending before the Court are the Joint Request for Ruling (Document #133) and the Joint Motion to Pass Trial Setting (Document #146) filed by third-party defendant Woodson Construction Company ("Woodson") and defendant Amoco Pipeline Company ("Amoco"). Additionally pending is the Joint Motion for Judgement filed by Amoco and plaintiffs. This Court has considered the motions and the applicable law and determines that the joint request for ruling should be granted, that ruling upon the joint motion to pass trial setting should be withheld, and that the joint motion for judgment should be granted.

In their joint request for ruling, Woodson and Amoco ask this court to provide clarification of its prior ruling denying Woodson's motion for summary judgment (Document #129) in order to "enhance the prospects of

settlement of resolution of [the] case without the necessity of a full trial." Document #133, p.2. Based upon this representation, the Court determines that the motion should be granted. Therefore, this Court advises the parties that the material question of fact which this Court previously determined prevented the grant of judgment as a matter of law is: What percentage, if any, of the injuries suffered by plaintiff Robert Lee Hamilton ("Hamilton") were caused by the negligence of Woodson.

Additionally, this Court determines that ruling upon the joint motion to pass should be withheld. Counsel should appear for Docket Call on September 30, 1993, at 10:00 a.m. as previously order (Document #145) at which time counsel should be prepared to advise the status of this case.

Finally, through their joint motion for judgment, Amoco and plaintiff as this Court to enter a take-nothing judgment with regard to the claim asserted by the plaintiffs against Amoco in accordance with the settlement reached between those parties. This Court determines that the motion should be granted. Based upon forgoing, it is

ORDERED that Woodson and Amoco's Joint Request for Ruling (Document #133) is GRANTED. It is further ORDERED that ruling upon Woodson and Amoco's Joint Motion to Pass Trial Setting (Document# 146) is WITHHELD until September 30, 1991. It is additionally ORDERED that Amoco and Plaintiff's Joint Motion for Judgment (Document #134) is GRANTED. Plaintiffs' shall TAKE NOTHING with regard to their claim against Amoco.

SIGNED at Houston, Texas, on this the 27 day of September, 1991.

/s/ David Hittner
DAVID HITTNER
United States District Judge

EXCERPTS FROM HEARING OF NOVEMBER 30, 1992,
(R.XI, 1-4, 12).

United States District Court
Southern District of Texas
FILED
APR 20, 1993
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT LEE HAMILTON ET AL	* CA-H-87-4158 *
	* Houston, Texas
VS.	* *
AMOCO PIPELINE COMPANY	* November 30, 1992 *
VS.	* 9:00 a.m. *
WOODSON CONSTRUCTION COMPANY AMOCO PIPELINE COMPANY	* * *

HEARING
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Amoco Pipeline:	By: Gerard J. Kimmitt and Edward J. Murphy Houston, Texas
For Hardford Accident & Indemnity	By: J. Stevens Jeffries

Houston, Texas

For Woodson Construction Company: By: Gary l Wickert
Houston, Texas

AND

Bradly M. Bingham and
Cheryl Roper
Houston, Texas

Court Reporter: Johnny C. Sanchez, CSR, RPR, CM
515 Rusk, #8114
Houston, Texas 77002

Proceedings recorded by mechanical stenography. Transcript produced by computer-assisted transcription.

THE COURT: Hamilton versus Amoco. Both sides here now?
MR. MURPHY: Yes, sir.
THE COURT: All right who represents the plaintiff?
MR MURPHY: ED Murphy and Jerry Kimmitt represent Amoco.
THE COURT: All right. And for -- Well, who represents the defendants? I know there are third parties basically here; is that correct?
So, you represent Amoco?
MR. MURPHEY: Yeah. There are only two of us left.
THE COURT: Right. And who represents Woodson?
MR. BINGHAM: Your Honor, Brad Bingham and Cheryl Roper.

THE COURT: All right. Come on up.

All right. Amoco. Is Woodson and Amoco joint tort-feasors.

MR. MURPHY: Yes.

THE COURT: They are?

MR. MURPHY; They are. According to the stipulation we entered into based on your prior ruling a couple of years ago in the numerous conferences we've had with you, we entered into a stipulation so that Woodson would be able to take that one issue up to the Fifth Circuit as a matter of law whether you were correct on your ruling that we have a course of action for contractual indemnity.

THE COURT: You're talking about that order on September 27th, '91?

MR. MURPHY: Well, that's the clarification of the order. The original order was December 12, 1990. Then we went through 10 months of clarification, reconfirmation and meetings with you and then we got a -- got a subsequent order of September 27, '91.

THE COURT: Well, let's see. Under Texas law, is it settling joint tort-feasors? Does that have any right of contribution from a non-settling joint tort-feasor?

MR. MURPHY: We're not seeking contribution. I don't

know why that's in there. The answer -- I'll answer your question directly. I agree with Mr. Bingham on that. I think the answer is "no" under the Beechcraft case. That's why we're not claiming it.

THE COURT: All right. Now, what about Woodson? There was a stipulation that Woodson was 50 percent negligent; right?

MR. BINGHAM: That's correct, Your Honor.

THE COURT: All right. Did Woodson know that Amoco thought it was entitled to contribution at that time?

MR. BINGHAM: Well, what we knew and all we knew, Your Honor, was that Amoco was of the opinion that with that stipulation -- with the finding of 50 percent against Woodson, that they's get something back, 50 percent or all. They wanted one or the other and that's all we knew.

THE COURT: So, what's the problem? What are we here on today, as far as you see it?

MR MURPHY: Okay. I don't mean to correct the Court.

THE COURT: Go on.

MR MURPHY: I'm sorry. We're not talking about contribution. We're talking about contractual indemnity.

Okay. We go back to starting in June, 1990, for six months after that up until December, 1990. We briefed, rebriefed, replied back and forth a number of times on the contractual indemnity issue. You denied their motion to have it dismissed.

We then got into a ten-month period of -- They were seeking clarification from the Court. We had about four

or five meetings with you discussing your ruling. Each time Brad, rightfully so, tried to persuade you to go the other way. You said, "No. They have a cause of action against you. That's the contractual indemnity cause of action."

We then got to the point that Brad, Jerry and I sat down and we told you we were doing this. We agreed to try to settle it and try to narrow the issues. We couldn't settle it completely; so, we got it to one issue, "Was Judge Hittner right on his ruling as a matter of law?" And that's what he

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MR. BINGHAM: The 7th.

THE COURT: I need two copies downstairs and one up in my office. December 7th by the end of business.

MR. MURPHY: Yes, sir.

MR. KIMMITT: Yes, sir.
THE COURT: December 7th. Make it simple. Okay?
MR. MURPHY: And can we -- If we can agree, we'll --
THE COURT: If you agree --
MR. MURPHY: -- exchange ours the same day?
MR BINGHAM: Sure.
MR MURPHY: I'll get you.
THE COURT: All right. I'll take a second look at this. You make that motion. I understand what you have in
mind. I will take a second look at it.
MR. MURPHY: Thank you very much.

(A recess was had)

COURT REPORTER'S CERTIFICATE

I, Johnny C. Sanchez, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Johnny C. Sanchez, CSR, RPR, CM
Johnny C. Sanchez, CSR, RPR, CM

Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this th 4 day of August, 1993.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM

APPENDIX AF

U.S. COURT OF APPEALS
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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 93-2138

**ROBERT LEE HAMILTON, ET AL.,
Plaintiffs,
VS.
AMOCO PIPELINE COMPANY
Defendant-Third Party
Plaintiff-Appellant
VS.
WOODSON CONSTRUCTION COMPANY
Third-Party Defendant-Appellee**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

PETITION FOR REHEARING OF THIRD PARTY DEFENDANT-APPELLEE WOODSON CONSTRUCTION COMPANY

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Defendant-Appellee
Woodson Construction Company

APPELLEE'S PETITION FOR REHEARING

COMES NOW, WOODSON CONSTRUCTION COMPANY, Appellee, and presents this petition for a rehearing and reconsideration of this Court's opinion delivered on February 22, 1994, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and in support hereof, respectfully shows:

1. THE COURT ERRED IN INTERPRETING PAGE AS CREATING AN "ACTUAL KNOWLEDGE"EXCEPTION TO THE EXPRESS NEGLIGENCE RULE, AND SHOULD AT A MINIMUM CERTIFY THE QUESTION TO THE TEXAS SUPREME COURT.

2. THE COURT ERRED IN REVERSING AND RENDERING JUDGMENT ON AN ISSUE NOT PROPERLY RAISED IN OR TRIED BY THE DISTRICT COURT.

INTRODUCTION

The Court's opinion in this case contravenes and overturns decades of Texas law on indemnity. Although the indemnity provision in question fails to meet the express negligence rule as established by the Texas Supreme Court in Ethyl Corporation v. Daniel Construction Company, 725 S.W.2d 705 (Tex 1987) and is therefore void as against public policy, the Court has held that Woodson has a duty to indemnify Amoco in proportion to Woodson's stipulated negligence because Woodson allegedly had actual notice of the void indemnity provision. The Court's opinion does not restate a "well settled principle of law" with "no precedential value," but rather seriously misconstrues clear Texas Supreme Court authority on the requisites of enforceable indemnity language. Accordingly, the Court should

reconsider its holding in light of the arguments presented herein.

I.

THE COURT IN INTERPRETING PAGE AS CREATING AN " ACTUAL KNOWLEDGE" EXCEPTION TO THE EXPRESS NEGLIGENCE RULE

A. THE PAGE CASE DOES NOT CREATE AN EXCEPTION TO THE EXPRESS NEGLIGENCE RULE, AND DOES NOT SUPPORT THE COURT'S HOLDING

the Court's opinion that an indemnity provision that fails the express negligence test is nevertheless enforceable if the indemnitor has actual knowledge of its terms is based solely on a footnote in Dresser Industries, Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex.1993). Not only is the footnote pure dicta, but the Page case also dealt with facts and issues materially distinguishable from those in this case, and therefore does not support the Court's opinion. In fact this is remarkably similar to Ethyl, in which the Texas Supreme Court held on substantially similar facts and contractual language, that there was no duty to indemnify the alleged indemnitee, either for its own negligence ***or for that of the purported indemnitor.*** The following discussion of the Page and Ethyl decisions and their application to the facts of this case will demonstrate to the panel that it has made a grave error in applying Texas law.

1. *Page*:the Facts, the Holding, and the Dicta

Page Industries, Inc. ("Page") hired Dresser Industries, Inc. ("Dresser" to conduct log tests on a well Page had drilled. In the contract between them, Page promised to indemnify and hold Dresser harmless from all claims for subsurface damage or injury to the well, *even is*

such claims were based on Dresser's alleged negligence. 853 S.W.2d at 506-507. One of Dresser's tools got stuck in the hole, and Page hired Houston Fishing Tools Co. ("HFTC") to remove the tool. In its contract with HFTC, Page agreed that HFTC would not be liable to Page on any theory of legal liability, ***including the sole or concurrent negligence of HFTC,*** for any injury or damage to property. Id. at 507. Page sued Dresser and HFTC, both of whom defended on the basis that the contractual provisions mentioned above relieved them of liability for their own negligence. The jury found Page's damages were caused in part by its own negligence (50%), in part by HFTC's negligence (40%), and in part by Dresser's negligence (10%). The trial court imposed damages on Dresser and HFTC in proportion to their degree of negligence as found by the jury, and both defendants appealed. *Id.* The appeals court upheld the award against Dresser (finding that the *indemnity* language in the Page/Dresser contract did *not* operate as a *release* between them), and *reversed* the award against HFTC, by finding that the release language in the Page/HFTC *did* operate to bar Page's suit against HFTC for negligence.

On further appeal, the Texas Supreme Court affirmed the appellate court's upholding of the award against Dresser, but reversed the appellate court's take-nothing judgment against HFTC. Recognizing a required two-step analysis, the court declared that releases, like indemnity provisions, must (1) pass the express negligence test, *and* (2) be conspicuous. *Id.* at 508. Noting that determination of the conspicuousness test is a question of law for the court, the supreme court found that the release language in the Page/HFTC contract was not conspicuous and was therefore unenforceable. *Id.* at 511.

Page is not applicable to this case because, while the

supreme court did not address the issue,[1] *the release language in the Page/HFTC contract passed the express negligence test* because it expressly provided for HFTC's release *from its own negligence*. The question in Page was whether the agreement was conspicuous. In contrast, the indemnity language in this case does **not** pass the express negligence test because it does not provide for Amoco's indemnification when it is negligent.[2] Page , therefore, is inapplicable to this case. Furthermore, Page simply does not hold that actual knowledge of an otherwise void indemnity provision satisfies the express negligence test. In other words, actual notice of an invalid indemnity agreement does not make it valid. While footnote 2 of the Page opinion, taken literally and out of context, might superficially support such a proposition, the footnote is pure dicta. Footnote on page 508 reads as follows:

> The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement. See generally Cate v. Dover Corp., 790 S.W.2d 559, 561 (Tex. 1990).

Because the Page opinion noted that the "fair notice requirements" include the express negligence test and the conspicuousness requirement, the Panel interpreted footnote 2 as meaning that actual notice of an invalid agreement

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[1] In footnote 5 on page 510, the Page court notes that because it found the provision inconspicuous as a matter of law, it did not have to reach the express negligence issue - a clear recognition that the analysis requires two step.

[2] As will be discussed below, the express negligence rule applies to situations where the indemnitee is seeking indemnity either for its own negligence, or for that of the indemnitor.

satisfies both the express negligence test and the conspicuousness requirement. Again, read literally, the footnote and its accompanying text might suggest that the proposition in a vacuum, however, the proposition is dicta in that it is not the basis of the Page opinion. Again, Page held that (1) releases must meet the express negligence test and be conspicuous; and (2) the release language at issue in the Page/HFTC contract was not conspicuous. Furthermore, if one reads past the footnote, Page unequivocally holds that the fair notice requirements include the express negligence test, as set forth the Ethyl opinion, AND the conspicuousness requirement.

Finally, the Cate case, cited as authority in the Page footnote, merely held that an inconspicuous warranty disclaimer is nevertheless effective if the buyer had actual knowledge of the disclaimer at the time of purchase. 790 S.W.2d at 561. However, in Cate, *the disclaimer, of which the buyer had actual knowledge, had the "magic words"* that are required under the Uniform Commercial Code, i.e., it specifically disclaimed the warranties of "merchantability" and "fitness for a particular purpose." Id. at 563; see Tex. Bus. & Comm. Code Ann.Sec. 2.136.

Clearly, Texas courts determine the validity of an indemnity provision under both prongs of the fair notice requirements: (1) the express negligence rule and (2) the conspicuousness requirement. See e.g., Enserch Corp. v. Parker, 794 S.W.2d (Tex 1990) (where court considered both the express negligence test and the conspicuousness requirement). This two step analysis of (1) clarity of language and (2) conspicuousness has a long history in Texas and elsewhere, in the context of indemnity, and otherwise. See, e.g., Goodyear Tire & Rubber Co. v. Jefferson Constr. Co., 565 S.W.2d 916 (Tex. 1978); K & S Oil Well Serv., Inc. v. Cabot Corp.,Inc., 491 S.W.2d 733 (Tex. Civ. App.--

Corpus Christi 1973, writ ref'd n.r.e.) (both of which hold that in order to be enforceable, indemnity provisions must be examined for particular language and conspicuousness); Jaskey Fin. & Leasing v. Display Data Corp., 564 F.Supp. 160 (E.D. Pa. 1983)(while disclaimer was held to be conspicuous, failure to mention specifically the warranty of merchantability ["magic words"] rendered disclaimer ineffective as to that warranty).

Not only is Page inapplicable to this case, but, as discussed below, this case is also factually on point with Ethyl, which, despite the Court's apparent aversion to the concept, requires "magic words" as well as conspicuousness for indemnity to be enforceable. If there is any doubt about this issue, given that the language in Page is undoubtedly dicta, the Court should at least certify the question to the Supreme Court of Texas. A motion to certify the question is being filed concurrently herewith.

2. *Ethyl*: the Facts, the Holding, and the Law

Ethyl Corporation ("Ethyl") hired Daniel Construction Co. ("Daniel Construction") to perform some construction work on Ethyl's chemical facility. Daniel Construction's employee, Donald Metcalf, was injured by chemicals accidentally released from Ethyl's piping system. Metcalf sued Ethyl, and Ethyl sued Daniel Construction for indemnity based the following provision to the Ethyl/Daniel Construction contract:

> **Contractor [Daniel Construction] shall indemnify and hold Owner [Ethyl} harmless against any loss or damage** to persons or property as a result of operations growing out of the performance of this contract and **caused by the negligence or**

> **carelessness of Contractor**, Contractor's employees, Subcontractors, and agents or licensees.

725 S.W.2d at 707. The jury found Ethyl 90% at fault and Daniel Construction 10% at fault. The Ethyl/Daniel Construction indemnity provision should be compared with the following provision in the Woodson/Amoco contract:

> **Contractor [Woodson] shall indemnify and save Company [Amoco] harmless from and against any and all losses, claims, demands**, liabilities, suits or actions (including all reasonable expenses and attorney's fees) for injuries to or the death of any person or persons, including the employees of each party hereto and the employees of their subcontractors, or for loss of or damage to the property of any person or persons, . . . **caused by or resulting from the negligence of the Contractor** or any of its subcontractors or the employees of either . . . .or by materials (except such as Company may have furnished) used in said work which are defective, or by reason of any other thing in connection with the performance of the Contract and the Contractor agrees to reimburse Company for all sums which Company may pay or be compelled to pay in settlement of any claim on account thereof, including any claim under the provisions of any worker's compensation law . . . except that the Contractor assumes no liability for the sole negligent acts of Company.

Amoco/Woodson contract Section X. The indemnity

provisions in the Amoco/Woodson contract and the Ethyl/Daniel Construction contract are analogous because (1) neither expressly provides that the indemnitor will indemnify the indemnitee against the indemnitee's own negligence, and, more significantly (2) both provide that the indemnitor will indemnify the indemnitee for the **indemnitor's** negligence.

3. The *Ethyl* court considered and expressly rejected comparative indemnification of a concurrently negligent indemnitee

Because the indemnity language in the Ethyl/Daniel Construction contract did not expressly state that Daniel Construction would indemnify Ethyl against Ethyl's own negligence, and because Ethyl had in fact been sued for negligence, the Texas Supreme Court case adopted the express negligence rule and held the indemnity provision void. Id. at 708. As a backup position, Ethyl, precisely like Amoco in this case, argued that even if the indemnity provision were too vague to require Daniel Construction to indemnify Ethyl for Ethyl's negligence, Daniel Construction should at least be required to contribute in proportion to Daniel Construction's own negligence of 10%. The court rejected this argument by reasoning and holding as follows:

> [T]he contract contains no provision for contractual comparative indemnity. Indemnities seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test.

Id. at 708 (emphasis added).

This case is directly on point with Ethyl. In both cases, the alleged indemnitor agreed to indemnify the indemnitee against its, the indemnitor's, own negligence. In both cases, the indemnity did not expressly provide for indemnification of the indemnitee's own negligence. There is nothing in the Woodson/Amoco contract which differs from that in the Ethyl/Daniel Construction contract with regard to a right of comparative indemnification. Nevertheless, while the Texas Supreme Court in Ethyl denied the comparative indemnity, this panel of the Fifth Circuit, purporting to apply Texas law, has granted it.

B. THE DISTRICT COURT APPLIED ETHYL CONSISTENTLY AND CORRECTLY IN DENYING AMOCO INDEMNITY FOR WOODSON'S STIPULATED NEGLIGENCE

The Court may be concerned about Amoco's argument that the District Court's denial of Woodson's Motion for Summary Judgment and its Final Judgment in favor of Woodson were somehow inconsistent with regard to the applicability of Ethyl to the facts at hand. Amoco argued that because the District Court found a fact issue as to Woodson's negligence, but not as to Amoco's negligence, it fairly assumed that the Court had implicitly found that Amoco's negligence was irrelevant, i.e., that the express negligence rule did not apply to bar Amoco's claim for indemnification for Woodson's negligence, even if Amoco were itself negligent. As the District Court itself explained, Amoco's assumption was unfounded. "The material fact issue precluding summary judgment was whether Woodson was 100% negligent" (R. II 1085-1087), in which case Amoco would clearly have been entitled to indemnification because by definition, with Woodson 100% negligent, Amoco would not have been seeking indemnification for

Amoco's own negligence, and Ethyl would not apply. "On the other hand, if, as the parties subsequently stipulated, Woodson were less than 100% negligent, Amoco would not be entitled to indemnification." (R. II 1085-1087). While the District Court's original proclamation that the fact issue precluding summary judgment was "What percentage, if any, of the injuries suffered by plaintiff were caused by the negligence of Woodson" (R. II 979) could have more precisely framed the fact issue, e.g., "were Plaintiff's injuries caused 100% by Woodson's negligence", its failure to do so does not create any inconsistence with its later ruling in favor of Woodson, and most certainly does not justify the rendering of a judgment against Woodson.

C. CONCLUSION

The agreement in Page, unlike the agreement in this case, was valid and enforceable under the express negligence test; therefore, the only question in Page was whether the agreement was conspicuous. There was no evidence or argument that the indemnitor in Page had actual knowledge of the provision at issue. Because it played no part in the decision itself, the loosely phrased footnote in Page was mere dicta and did not create an exception to the substantive express negligence test. In fact, this case is directly analogous to Ethyl, where the Texas Supreme Court denied comparative indemnity because the agreement in that case did not contain the specific "magic words." Like the agreement at issue in Ethyl, the indemnity provision did not specifically provide for a right of comparative indemnity, yet this Court has allowed the indemnitee to recover because the indemnitor allegedly had notice of an admittedly void provision.

Ethyl's requirement of magic words had a purpose: to stop the "plethora of lawsuits to construe ... ambiguous contracts ...and to cut through that ambiguity." 725 S.W.2d at 708. Under the reasoning of this Court's opinion, any indemnitee can enforce an indemnity provision that is otherwise invalid under the express negligence test, merely by showing that the indemnitor had notice of the provision. If the Court's opinion is allowed to stand based on that interpretation, the express negligence rule is rendered meaningless, and the tide of litigation which the Supreme Court sought to stem in Ethyl would return in floods of claims that the indemnitor had actual knowledge of the indemnity provision.[3] In addition to causing a flood of litigation over the "actual notice" issue, the Court's elimination of the bright line or "magic word" requirement will inject uncertainty into the risk shifting and insuring of projects governed by Texas law. In order to deal with that uncertainly, risks will have to be double insured, at a considerable waste of time and money without any resulting benefit.

Accordingly, the Court should withdraw its opinion in this case and affirm the District Court's Judgment that the indemnity provision is not enforceable.

II.

THE COURT ERRED IN REVERSING AND RENDERING JUDGMENT ON AN ISSUE NOT PROPERLY RAISED IN, MUST LESS TRIED BY, THE DISTRICT COURT

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[3] If allowed to stand, the Court's opinion will certainly benefit sellers of posterboard and other demonstrative aids, as clever indemnities will present their otherwise void contracts in this form so as to "prove" the indemnitor's actual (or constructive?) notice of the provision, *e.g.*, "surely he must have seen it".

The Court reversed the District Court's take-nothing judgment in favor of Woodson and remanded the case for entry of judgment in favor of Amoco on the grounds that Woodson's alleged knowledge of the indemnity provision overcame the provision's failure to meet the express negligence test. The District Court's judgment was based on stipulated facts. (R. II 1046-1048). Woodson's alleged knowledge and the purported effect thereof were not a part of the stipulated facts, and were never properly raised by Amoco nor tried in the District Court. A party may not agree to a trial on stipulated facts, and then later attempt to raise new issues after an adverse judgment. Interfirst Bank Abilene, N.A. v. FDIC, 777 F.2d 1092, 1096 (5th Cir. 1985); Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1030 (5th Cir. 1982); Thomlinson v. Lefkowitz, 334 F>2d 262, 262 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965).

The only evidence in the record regarding Woodson's alleged knowledge of the indemnity provision is in the form of excerpts from the transcript of Louis Woodson's deposition. Those excerpts occur in two places: first, in Amoco's Response to Woodson's Motion for Summary Judgment; and second, in Amoco's Brief in Support of its [second] Motion to Enter Judgment, which was filed on December 7, 1992, well after the Court had entered a FINAL JUDGMENT on October 9, 1992 (R II 1043-1045), ordering that Amoco take nothing from Woodson.

The issues of Woodson's knowledge of the indemnity provision and the effect of any such knowledge were not before the District Court when it granted its original Final Judgment in favor of Woodson. While Amoco had attached the transcript excerpts to its Response to Woodson's Motion for Summary Judgment, Amoco's only arguments with regard to Woodson's alleged knowledge of the indemnity

agreement were that (1) Woodson had waived its statutory (worker's compensation act) immunity from suit; and (2) the Woodson/Amoco contract should be reformed on grounds of mutual mistake. (R. II 761-764). Amoco did not argue that actual knowledge of an otherwise void indemnity agreement constituted an exception to Ethyl's requirements. Furthermore, the District Court ruled that the **only fact issue** precluding summary judgment for Woodson related to **the existence and extent of Woodson's negligence, if any** (R. II 979), necessarily implying the District Court's finding that the issue of Woodson's knowledge of the void indemnity provision was irrelevant. Furthermore, even if Amoco initially raised the issue of Woodson's knowledge in its Response to Woodson's Motion for Summary Judgment, its failure to obtain a stipulation on the issue, and its failure to brief the issue in its original "Motion for Entry of Judgment" (R. II 1028-1029) constituted an abandonment of that issue, such that it is not appealable. Fehlhaber, 681 F.2d at 1029-1030.

Nor did Amoco raise the issue or effect of Woodson's alleged knowledge in its Motion for New Trial or to Alter or Amend Judgment, filed on October 26, 1992. (R. II 1051-1053). In fact, the first time Amoco argued that actual knowledge of an otherwise void indemnity agreement constituted an exception to Ethyl was well after entry of the District Court's original Final Judgment in favor of Woodson, when, in response to the District Court's order of November 30, 1992 (R. II 1066) that both parties file Briefs by December 7, 1992, Amoco filed its "Brief in Support of its Motion for Judgment" on December 7, 1992 (R. II 1071-1082). Woodson had filed its Brief in Support of Judgment (R. II 1067-1070) on December 4, 1992, before Amoco's Brief, and, because Woodson had no notice that the issue or effect of Woodson's knowledge of the indemnity agreement was being argued by Amoco, it did not address those issues in its Brief.

Furthermore, the evidence presented in support of Amoco's position was insufficient to sustain a judgment against Woodson in any event. Mr Woodson's quoted deposition testimony did not establish that he had any authority to bind Woodson to any agreement or understanding respecting indemnity. Finally, at best, Mr. Woodson's testimony merely demonstrates that he personally had knowledge of a provision which, under Ethyl, is void as against public policy.

Because of Amoco's failure to present properly the issue of Woodson's alleged knowledge, either in the context of the trial on stipulated facts or in its Motion for New Trial, Woodson was deprived of its right to develop evidence bearing on its alleged knowledge of the nature of the indemnity obligation. In the interests of justice, it is imperative that this Court reconsider its initial opinion and either withdraw its previous opinion because of Amoco's failure to preserve the issue for appeal, or remand the case to allow Woodson to present evidence and argument with regard to its alleged knowledge of the indemnity provision, and the effect thereof.

CONCLUSION

The Court has held that by virtue of a footnote to Page. a case which addressed a different issue than the present case, the Texas Supreme Court intended to and did erase two decades of black-letter law by creating an "actual knowledge" exception to the express negligence rule. Clearly, such a result could not be the intention of the Texas court, otherwise the express negligence requirement is rendered meaningless and the floodgates of litigation have been reopened. Accordingly, the Court should reconsider and withdraw its opinion and affirm the judgment of the trial court, or, at a minimum, certify the question to the Texas Supreme Court and reconsider its opinion after receiving a response.

The Court has also held that a heretofore unknown fact issue of Woodson's alleged notice of the indemnity provision has been established as a matter of law. Amoco has failed to preserve properly this issue at the trial level as well as on appeal. Accordingly, the Court should reconsider its original opinion and either withdraw the opinion and affirm the District Court's judgment, or remand the case for a new trial on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record in this cause, and that the original of same has been duly filed with the Clerk of the Court, on this the 22nd day of March, 1994.

/s/ Bradley M. Bingham
BRADLEY M. BINGHAM